Supreme Court, U.S.
FILED
JUN 26 1970

in the

Supreme Court

of the

United States

October Term, 1969

No. 1,752 320

MAURICE H. SCHY,

Petitioner,

vs.

THE SUSQUEHANNA CORPORATION, a Delaware corporation, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSEN, D. W. REEVES, R. C. SCHENK and N. F. TISDALE, JR.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAURICE H. SCHY
9225 Collins Avenue
Surfside, Florida 33154
Petitioner pro se.

MIAMI REVIEW — 371-4853 — 377-3721

INDEX TO APPENDIX

	Page
Appendix "A" — Opinion of the Court of Appeals [January 5, 1970].	1-9
Appendix "B" — Statutes Involved.	11-17
Appendix "C" — Minute Order of the District Court denying plaintiffs' motion for leave to file instanter his amended and supplemental complaint [November 7, 1968] (A.172).	19
Appendix "D" — Order of the District Court dismissing action as a class action and dismissing action with prejudice and with costs against plaintiff [November 8, 1968] (A. 186a).	19
Appendix "E" — Opinion of the District Court [October 15, 1968].	19-20
Appendix "F" — Findings of Fact and Conclusions of Law by the District Court [November 8, 1968].	21-34

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1969 September Session, 1969

No. 17,393

MAURICE H. SCHY,

Appellant,

v.

The Susquehanna Corporation, a Delaware corporation, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSEN, D. W. REEVES, R. C. SCHENK and N. F. TISDALE, JR.,

Appellees.

January 5, 1970.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Before KNOCH and CUMMINGS, *Circuit Judges*, and GORDON, *District Judge*.

GORDON, *District Judge*.[1] This action was brought

---

[1]The writer of this opinion is sitting by designation from the district court for the Eastern District of Wisconsin.

for equitable relief from an alleged violation of §14(a) of the Securities and Exchange Act, 15 U.S.C. §78n, and the applicable regulation. The district court dismissed the complaint with prejudice and denied leave for the plaintiff to file an amended complaint.

The plaintiff is one of 9,145 stockholders of the Susquehanna Corporation. In his complaint, he has alleged that Susquehanna issued a false and misleading proxy statement on March 29, 1967. The purpose of that statement was to obtain stockholder approval of a proposed new issue of Susquehanna preferred stock. The plaintiff claimed that Susquehanna failed in the proxy statement of March 29 to inform stockholders of a planned merger with Atlantic Research Corporation and of the intended use of the new preferred stock to carry out such merger.

Although a majority of the shares outstanding were voted to approve the new stock issue, no preferred shares were issued pursuant to the proxy statement of March 29. On August 2, 1967, the board of directors of Susquehanna approved a merger with Atlantic Research Corporation; on October 18, 1967, the plaintiff filed his complaint.

On October 26, 1967, Susquehanna and Atlantic issued a joint proxy statement. Like Susquehanna's proxy statement of March 29, this joint proxy statement also sought authorization for a new issue of preferred stock. The proxy statement also outlined the stock's contemplated use in effectuating the merger of the two companies, and it fully described the terms of the proposed new issue of the stock and of the merger. It further described, in ample detail, the plaintiff's pending law suit. At the oral argument of this appeal, the plaintiff's counsel acknowl-

edged that the joint proxy statement was accurate and complete. On November 27, 1967, the stockholders approved the plan described in the joint proxy statement dated October 26 by a vote of 80.8% to 0.42%.

The plaintiff filed a motion for summary judgment which he thereafter withdrew but later renewed. The defendants also filed a motion in which they applied for an order that the plaintiff could not maintain his action as a class action and also to dismiss on the ground that the plaintiff had failed to seek redress from the stockholders before instituting his action.

Following a hearing on the defendant's motion, the district judge rendered an oral opinion granting such motion on the grounds stated in the motion and on the additional ground, raised at the oral argument, that the plaintiff, as a matter of law, was unable to show any damage resulting from the alleged fraudulent proxy statement. Later, a judgment was entered dismissing the action on the merits.

The plaintiff owns 100 shares of Susquehanna stock. He is an attorney and has aided in preparation of this suit. He has an arrangement with his attorneys whereby he will share in the attorneys' fees should he prevail in the action.

I. PROBLEMS OF MOTION PRACTICE

The plaintiff contends that the defendants' motion could not be construed as a motion under rule 12(b)(6) to dismiss for failure to state a claim upon which relief can be granted. For that reason, he argues, the motion could not be treated as a motion for summary judgment under rule 12(b). We reject this contention.

The defendants' motion charged that the plaintiff's suit was premature for failure to seek redress within the corporation. Prematurity may be raised on a motion to dismiss under rule 12(b) (6), but a dismissal granted upon this ground alone must be without prejudice. *Tademy v. Scott et al*, 157 F.2d 826, 828 (5th Cir. 1946); *Van Horn v. State Farm Mutual Automobile Insurance Co.*, 283 F. Supp. 260, 261 (E.D. Mich. 1966), affirmed 391 F.2d 910.

In addition, a motion to dismiss based upon a lack of damages, may properly be treated as a motion to dismiss under rule 12(b) (6). In *Premier Malt Products Co. v. Kasser*, 23 F.2d 98, 99 (E.D.Pa. 1927), the court observed:

> "There must be both the injuria and the damnum to give a legal cause of action, and this remains true notwithstanding the legal fiction of nominal damages. Indeed, this truth made the legal fiction logically necessary."

Accord, *Citrin v. Greater New York Industries*, 79 F. Supp. 692, 694-5 (S.D.N.Y. 1948); *Package Closure Corporation v. Scalright Co.*, 4 F.R.D. 114, 116 (S.D.N.Y. 1943). The plaintiff states that defendants were not entitled to raise the question of damages at the hearing on their motion. The matter of damages would appear to have been improperly raised at the hearing as a ground for dismissal since the defendants had not mentioned it in their notice of motion. See *McNichols v. Lennox Furnace Co.*, 7 F.R.D. 40, 42-3 (N.D.N.Y. 1947). However, the plaintiff fully argued this ground at the hearing and cannot complain here that the district court considered it. *DeLorenzo v. Federal Deposit Insurance Corporation*, 268 F.Supp. 378, 381 (S.D.N.Y. 1967); *Interlego, A. G. v. Leslie-Henry Co.*, 214 F.Supp. 238, 240 (M.D. Pa. 1963).

The plaintiff also contends that even if properly construed as a motion to dismiss under rule 12(b)(6), the defendants' motion may not be treated as a motion for summary judgment since it was made after the answer had been filed. This argument is without merit. A motion to dismiss made after the filing of an answer serves the same function as a motion for judgment on the pleadings and may be regarded as one. *United States for Use of E. E. Black Limited v. Price-McNemar Construction Co.*, 320 F.2d 663, 664 n. 1 (9th Cir. 1963); *Kenemer v. Arkansas Fuel Oil Co.*, 151 F.2d 567, 568 (5th Cir. 1945). Cf. *In re Union National Bank & Trust Co. of Souderton, Pa.*, 287 F. Supp. 431, 433 (E.D. Pa. 1968). Rule 12(c) concerns motions "after the pleadings are closed" and specifically provides that a motion for judgment on the pleadings filed with supporting affidavits may be treated as a motion for summary judgment.

The plaintiff next complains that the district court erroneously considered affidavits and exhibits filed on the day of the hearing in violation of rule 6(d), Federal Rules of Civil Procedure. The plaintiff did not complain of untimeliness in the trial court, although he did urge the court not to consider the exhibits as evidence. Since the plaintiff did not complain about the late filing in the trial court, he cannot do so on appeal.

The plaintiff further contends that the district court should not have considered the October 26, 1967 proxy statement in rendering its decision. He argues that the copy filed in support of the defendants' motion did not comply with the requirements of rule 56(e) and, thus, did not constitute a sufficient affidavit. We reject the plaintiff's contention. The plaintiff has admitted that the Octo-

ber 26, 1967 proxy statement is complete and accurate; he does not deny that the copy submitted with the motion is an accurate copy of the October 26, 1967 proxy statement. An officer of Susquehanna in a separate affidavit identified the attached proxy statement. In *Pollack v. City of Newark, N. J.*, 147 F.Supp. 35, 39 (D. N.J. 1956), affirmed 248 F.2d 543, certiorari denied 355 U.S. 964, the district court said:

> "Moreover in considering a motion for summary judgment, the court is entitled to consider exhibits and other papers that have been identified by affidavit or otherwise made admissible in evidence."

See *Barker v. Summey*, 185 F. Supp. 298 (N.D. Ind. 1960); *Hartford Accident and Indemnity Co. v. Flanagan*, 28 F. Supp. 415 (S.D. Ohio 1939).

Finally, the plaintiff urges that the district court should not have made a determination under rule 23(c), Federal Rules of Civil Procedure, as to whether the plaintiff could maintain his suit as a class action without having first given notice to members of the class that the court planned to make such a determination.

The Committee Note of 1966, quoted in 3B, *Moore's Federal Practice*, ¶23.01[11.-1], page 23-32, states:

> "Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d)(2)."

In our opinion, the trial court did not abuse its discretion by refusing to order that notice be given of its intention to make a determination when every member of the class has already received a proxy statement containing a full, accurate and complete description of the pending action. Cf. *Snyder v. Board of Trustees of the University of Illinois*, 286 F. Supp. 927, 931 (N.D. Ill. 1968).

In conclusion, we hold that the procedure followed by the district court in granting summary judgment did not involve reversible error. We will now consider the propriety of the substantive rulings.

II. MAINTENANCE OF CLASS ACTION.

The plaintiff contends that he could properly represent the class. We disagree and hold that the district court correctly found that this action could not be maintained as a class action.

In determining the adequacy of representation, the district court is not confined to the specific procedure outlined by rule 23. It was proper to consider the additional circumstances and facts of the case. After being fully informed of the nature of the plaintiff's pending suit, 80.8% of the stockholders voted in favor of the proposal made in the October 26, 1967 proxy statement, thereby approving the issuance of preferred stock for use in effectuating the merger. Only 0.42% voted against it. Since over eighty percent of the class voted in favor of the proposal of which the plaintiff's suit complains, and they did so with full knowledge of the plaintiff's suit, it is somewhat difficult for the plaintiff to claim that he represents the class.

The plaintiff cannot maintain his action as a class suit when his interests are antagonistic to the interests of the persons he purports to represent. *Hansberry* v. *Lee*, 311 U.S. 32, 44-5 (1940); *Carroll* v. *American Federation of Musicians of U.S. and Can.*, 372 F.2d 155, 162 (2d Cir. 1967), judgment vacated on other grounds, 391 U.S. 99 (1968); *Troup* v. *McCart*, 238 F.2d 289, 294 (5th Cir. 1956).

III. CAUSATION

The defendants maintain that the district court found that the October 26, 1967 proxy statement broke the chain of causation between the earlier proxy statement and any damage allegedly caused by it. The plaintiff denies that this issue was raised in the district court and objects to considering it on this appeal; he insists that causation is a fact issue which must be settled by a trial.

Since this issue can be resolved on the basis of affidavits which were filed in the district court and were considered in its decision, it may be raised and settled here. In *Reinstine* v. *Rosenfield*, 111 F.2d 892, 894 (7th Cir. 1940), the court said:

> "From time immemorial Courts of Appeal have been authorized to affirm the rulings of lower courts for any valid reason based upon the evidence, although not assigned."

No shares of preferred stock were ever issued pursuant to the March 29, 1967 proxy. The shares which were issued and used to effectuate the merger were issued in response to the October 26, 1967 proxy, which the plaintiff admits was fair and complete.

Under the foregoing circumstances, we believe the district court correctly held that as a matter of law, no damage was caused by the March 29, 1967 proxy. *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 430-1 (1964) and *Mills* v. *Electric Autolite Company*, 403 F.2d 429, 435-6 (7th Cir. 1968), certiorari granted, 394 U.S. 971, referred to by the plaintiff, are distinguishable in that they involved factual disputes. Compare also *Swanson* v. *American Consumer Industries, Inc.*, 415 F.2d 1326 (7th Cir. 1969). Here there was no influence from the March 29, 1967 proxy statement which was unremedied by the October 26, 1967 proxy statement.

IV. CONCLUSION

Shortly before the beginning of oral argument, counsel for the defendant submitted certain documents to the court with the request that the court consider them in connection with this appeal. Counsel for the plaintiff objected to this offer on the ground that it was not timely made. The court is of the opinion that the objection of the plaintiff is well taken and, accordingly, has not considered such documents in deciding this appeal.

Since we find sufficient grounds to support the judgment of the district court, it is unnecessary to consider certain other lesser errors which the appellant has raised.

The judgment of the district court is affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

CITED STATUTES

SECURITIES ACT OF 1934 (15 U.S.C.A. §78a-78hh-1)

"PROXIES

Sec. 14(a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title."

GENERAL RULES AND REGULATIONS OF THE SECURITIES AND EXCHANGE COMMISSION UNDER THE SECURITIES ACT OF 1934 (17 CFR 240)

"REGULATION 14A

SOLICITATION OF PROXIES

* * *

Rule 14a-8. Proposals of Security Holders.

(a) If any security holder entitled to vote at a meeting of security holders of the issuer shall submit to the management of the issuer, within the time hereinafter

specified, a proposal which is accompanied by notice of his intention to present the proposal for action at the meeting, the management shall set forth the proposal in its proxy statement and shall identify it in its form of proxy and provide means by which security holders can make the specification provided for by Rule 14a-4(b). The management of the issuer shall not be required by this rule to include the proposal in its proxy statement for an annual meeting unless the proposal is submitted to the management not less than 60 days in advance of a day corresponding to the first date on which the management's proxy soliciting material was released to security holders in connection with the last annual meeting of security holders, except that if the date of the annual meeting has been changed as a result of a change in the fiscal year, a proposal shall be submitted a reasonable time before the solicitation is made. A proposal to be presented at any other meeting shall be submitted to the management of the issuer a reasonable time before the solicitation is made. This rule does not apply, however, to elections to office or to counter proposals to matters to be submitted by the management.

(b) If the management opposes the proposal, it shall also, at the request of the security holder, include in its proxy statement a statement of the security holder, in not more than 100 words, in support of the proposal, which statement shall not include the name and address of the security holder. The proxy statement shall also include either the name and address of the security holder or a statement that such information will be furnished by the issuer or by the Commission to any person, orally or in writing as requested, promptly upon the receipt of any oral or written request therefor. If the name and address

of the security holder is omitted from the proxy statement, it shall be furnished to the Commission at the time of filing the management's preliminary proxy material pursuant to Rule 14a-6(a). The statement and request of the security holder shall be furnished to the management at the same time that the proposal is furnished. Neither the management nor the issuer shall be responsible for such statement."

"Rule 14a-9. False or Misleading Statements.

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading."

FEDERAL RULES OF CIVIL PROCEDURE

(28 U.S.C.A.)

"Rule 12. Defenses and Objections — When and How Presented — by Pleadings or Motion — Motion for Judgment on Pleadings.

* * *

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter . . . . (6) failure to state a claim upon which relief can be granted . . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

"Rule 15. Amended and Supplemental Pleadings.

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

* * *

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the Court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor."

"Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if *** (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

"Rule 23.1. Derivative Actions by Shareholders.

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter de-

volved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivation action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs."

"Rule 56. Summary Judgment.

* * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing advidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits."

APPENDIX "C"

Minute Order of the District Court entered on Nov. 7, 1968, denying plaintiff's motion for leave to file instanter his amended and supplemental complaint (A. 172).

APPENDIX "D"

Order of District Court entered on Nov. 8, 1968, dismissing action as a class action and dismissing action with prejudice and with costs against plaintiff (A.186a).

APPENDIX "E"

Opinion of the District Court [October 15, 1968](A. 144)

THE COURT: I have devoted several hours to this motion, and the various documents. I read them and I had to re-read them to clarify myself on it.

I am of the opinion that this case should be dismissed for failure to allege damages adequately in the first instance, either to the stockholders or to the corporation, to specifically set it out.

I am also of the opinion they did not exhaust their remedies that should have been exhausted. I have in mind counsel's explanation of it, but I am still of the opinion that they had an obligation, this plaintiff did.

I think, furthermore, that he is in a different class from the other stockholders. I think he is not entitled to represent this class of stockholders what he purports to. Then, above all, this whole matter has been before the stockholders in this matter and they have had full knowledge of it. Their action, by more than 80 percent of those voting, convinces me this cause should be dismissed.

* * *

APPENDIX "F"

UNITED STATES DISTRICT COURT
for the
Northern District of Illinois
Eastern Division

No. 67 C 1790

MAURICE H. SCHY,

Plaintiff,

v.

THE SUSQUEHANNA CORPORATION, a Delaware corporation, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSEN, D. W. REEVES, R. C. SCHENK, and N. F. TISDALE, JR.,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came before the Court on motion by Defendants for an order that the action cannot be maintained as a class action, and also a motion by Defendants to dismiss the Complaint. Memoranda, together with exhibits, were filed in support of the Defendants' motions and in opposition thereto. The Court heard oral argument on October 12, 1968. At the oral argument Defendants submitted certain material in support of their motion to dismiss, marked as Defendants' Exhibit 1.

Based on the foregoing, the Court makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. Plaintiff Maurice H. Schy ("Plaintiff") is the holder of 100 shares of the common stock of Defendant The Susquehanna Corporation ("Susquehanna"). [A-174] The individual Defendants are two former officers and directors of Susquehanna and seven present officers and directors of Susquehanna, including Herbert F. Korholz, its President and a member of the Board of Directors (Korholz). One Defendant, Norman F. Tisdale, Jr., did not become a director until May 18, 1967.

2. On March 29, 1967, the individual Defendants (except Tisdale) distributed proxy material in which the Board of Directors of Susquehanna recommended that the stockholders approve an amendment to the Certificate of Incorporation authorizing three million shares of voting preferred stock. At that time the Certificate of Incorporation authorized only common stock, not preferred.

3. At the annual meeting of Susquehanna stockholders held April 21, 1967, the stockholders approved the adoption of an amendment to Susquehanna's Certificate of Incorporation by which a class of 3,000,000 shares of voting preferred stock was authorized by the affirmative vote of 72% of the shares entitled to vote, with 2.5% of the shares so entitled voting in the negative.

4. Early in August 1967 it became public knowledge that the Board of Directors of Atlantic Research Corporation ("Atlantic Research") had recommended to their stockholders the approval of a merger proposal made by Susquehanna.

5. The Complaint herein was filed on October 18, 1967. Plaintiff therein alleged that he brought the action "for himself and on behalf of [A-175] the other shareholders of Susquehanna situated similarly with Plaintiff." The class consists of approximately 9,000 stockholders. The Complaint prayed that Susquehanna be enjoined from calling a special meeting of the stockholders of Susquehanna for the purpose of submitting to the stockholders for their approval the proposed merger with Atlantic Research, which involved the issuance of the voting preferred stock. The Complaint, in essence, sought to prevent the proposed Susquehanna-Atlantic Research merger, and the Court understands that, if Plaintiff's demand for injunctive relief is now pressed, such requested relief would result in a setting aside of that merger.

6. On October 26, 1967, the Boards of Directors of Susquehanna and Atlantic Research distributed a Joint Proxy Statement which stated, in part:

> "The Board of Directors, at its meeting on March 13, [1967] adopted a resolution by which the Certificate of Incorporation of the Corporation would be amended to authorize the issuance of an additional class of 3,000,000 shares of voting preferred stock with a par value of $5 per share. This class of preferred stock will be in addition to the presently authorized class of $1 par value stock, of which 5,000,000 shares are authorized and 3,287,804 are outstanding and entitled to vote. The authorization of the class of preferred stock will not in any way affect the presently authorized class of $1 par value stock,

except that the $1 par value stock will, after approval of the amendment, be described as $1 par value common stock.

"The Board has declared the advisability of this amendment and has directed that it be submitted to the stockholders at the annual meeting. A copy of the resolution setting forth the amendment as adopted by the Board of Directors is attached as Exhibit A to this Proxy [A-176] Statement. Under Delaware law such an amendment must be approved by a majority of the outstanding shares of the Corporation entitled to vote at the meeting.

"Management recommends the approval of this amendment. The existence of a class of 3,000,000 voting shares of preferred stock will provide the Corporation with a greater flexibility of action in the event that opportunities for expansion arise. Management believes that the Corporation should be in a position to tailor the terms of the preferred stock to market requirements whenever a favorable acquisition develops or a need for capital exists because of internal growth of the Corporation. Accordingly, the Board of Directors has been given authority to determine all provisions of the preferred stock other than its voting rights and its par value.

"Under Delaware law, the Board of Directors has authority to issue all or any part of the authorized but unissued stock of the Corpora-

tion. The Certificate of Incorporation does not reserve preemptive rights to stockholders with respect to the existing $1 par value stock, nor will it as to the $5 par value preferred stock. If the proposed amendment is approved, the Board of Directors will have authority to issue amounts of the new $5 par value preferred stock, as well as additional amounts of the $1 par value common stock, without further action by the stockholders. Management has no present plan to issue any shares of the existing $1 par value stock, or if the authorization of the proposed $5 par value preferred stock is approved, to issue any shares of that class. However, Management anticipates that stock of either class might be issued as part of the consideration paid by the Corporation upon a future acquisition or merger."

7. Attached to the Proxy Statement dated March 29, 1967 as Exhibit A was a copy of a resolution of the Board of Directors of Susquehanna adopted on March 13, 1967. The resolution proposed that Article fourth of the Certificate of Incorporation be amended to read:

[A-177] "FOURTH . . . Without limitation on the generality of the foregoing, such Preferred Stock, and any class or series thereof, may be made subject to redemption at such time or times and at such price or prices, may be made convertible into, or exchangeable for, shares of any other class or classes or of any other series of any class of stock of the Corpora-

tion at such price or prices or at such rates of exchange and with such adjustments, and shall be subject to such provisions as to reissue upon redemption or purchase by or surrender to the Corporation, including the prohibition thereof, as shall be stated and expressed in the resolution or resolutions adopted by the Board of Directors providing for the issue of such Preferred Stock and of any class or series thereof; and further, each holder of such Preferred Stock and of any class or series thereof, shall be entitled to receive dividends at such rates, on such conditions, with such preferences (whether cumulative or noncumulative) and at such times, and to have such rights upon the dissolution of, or upon any distribution of the assets of, the Corporation, as shall also be stated and expressed in the said resolution or resolutions adopted by the Board of Directors as aforesaid."

8. The Joint Proxy Statement dated October 26, 1967, informed Susquehanna stockholders fully as to the contentions made and relief requested by Plaintiff in his Complaint herein. The Joint Proxy Statement at page 36 stated as follows concerning the Complaint:

"On October 19, 1967, Maurice H. Schy, a plaintiff in two of the above described actions, *Dasho, et al.* v. *Susquehanna, et al.*, No. 65-C-1757 in the United States District Court for the Northern District of Illinois, and the *Dasho* case pending in the Illinois state court, filed another suit in the United States District Court for the

Northern District of Illinois, Eastern Division, Civil Action No. 67-C-1790, against Susquehanna, its eight present directors, and one former director. Plaintiff alleged that the individual defendants caused Susquehanna on March 29, 1967, to distribute, in violation of the Securities Exchange Act of 1934, a "deceitful and misleading" proxy statement which solicited the proxies of common stockholders of Susquehanna for the amendment [A-178] of its Certificate of Incorporation to authorize the issuance of 3,000,000 shares of preferred stock with a par value of $5 per share. The 3,000,000 shares include the Class A Cumulative Convertible Preferred Stock to be exchanged for Atlantic Research common stock under the terms of the proposed merger.

"Plaintiff claims that the proxy material distributed March 29, 1967, was false and deficient in failing to disclose the following alleged facts; that prior to December 6, 1966, the defendants had resolved to merge Atlantic Research into Susquehanna by exchanging Susquehanna preferred stock, not then in existence, for Atlantic Research common stock; that merger negotiations with Atlantic Research had been initiated and were continuing on March 29, 1967; that in December, 1966, Defendant H. F. Korholz, Chairman of the Board of Directors of Susquehanna, had entered into two agreements with Dr. Arch C. Scurlock, a director of Atlantic Research, relating to this proposed merger; that Mr. Korholz acquired contract rights to pur-

chase Atlantic Research shares held by Television-Electronics Fund, Inc., and Susquehanna purchased Atlantic Research shares from Axe-Houghton Funds, Inc., as part of the proposed Atlantic Research—Susquehanna merger; that, during the period of merger negotiations with Atlantic Research prior to March 29, 1967, merger negotiations also were being conducted with Xebec Corporation; that the 3,000,000 shares of preferred stock were intended to be used in both such proposed mergers; that the preferences of such preferred stock would materially impair the equity position of the common stockholders of Susquehanna; and that, had the common stockholders been fully informed concerning the foregoing alleged facts, the amendment to the Susquehanna Certificate of Incorporation authorizing the issuance of 3,000,000 shares of preferred stock would not have been approved.

"Plaintiff prays that all the proxies solicited and received by Susquehanna Management, and voted at the annual meeting of stockholders on April 21, 1967, be held void; that less than a majority of the outstanding common stock of Susquehanna be held to have been represented at that annual meeting; that Susquehanna be enjoined from issuing any of the 3,000,000 preferred shares and be required to rescind the authorization for such shares; that Susquehanna be enjoined from calling a stockholders' meeting to vote on the proposed Susquehanna-Atlantic

Research merger; and that judgment be entered for the Plaintiff's costs, expenses, and attorneys' fees. Based upon the facts presently within their knowledge, it is the opinion of counsel for Susquehanna that the *Schy* suit is without merit."

[A-179] 9. The Joint Proxy Statement (pages 5, 7 and 8) also informed the stockholders that 1,970,449 shares of the new preferred stock, designated Class A Cumulative Convertible Preferred Stock, were to be exchanged for Atlantic Research common stock to effect the merger. The principal terms of the Class A Preferred also were set forth, including dividend rights, liquidation rights, and redemption provisions. The Joint Proxy Statement contained a resolution of the Board of Directors setting forth the rights and preferences of the Class A Preferred Stock (Exhibit I, page 27), and described the voting and liquidation rights of the common stock (pages 8-9).

10. The Joint Proxy Statement thus detailed the proposed merger, including the use of Susquehanna voting preferred stock to be exchanged for common stock of Atlantic Research. The litigation section of the Joint Proxy Statement contained a complete thumbnail sketch of the Complaint herein, including the relief requested. The Susquehanna stockholders thus were fully informed concerning Plaintiff's contentions and his prayers for relief.

11. At the Susquehanna stockholders meeting on November 27, 1967, 80.8% of the outstanding stock was voted in favor of the merger (99.5% of those voting), and 0.42% was voted against the merger. The merger with Atlantic Research was effected on December 4, 1967.

[A-180] 12. In connection with that merger, 1,970,449 shares of Susquehanna Class A preferred stock were promptly issued in exchange for an equivalent number of shares of Atlantic Research common stock. Such Class A shares have been registered and traded on the American Stock Exchange since December 18, 1967. In April 1968, a merger was effected between Xebec Corporation and Susquehanna, and approximately 450,000 shares of Susquehanna common stock were issued in exchange for Xebec common stock. In August 1968, Susquehanna issued to approximately 1,000 purchasers convertible debentures in the face amount of $22,500,000. These debentures are convertible into common stock, at a specified rate.

13. The Complaint did not allege monetary damage to Susquehanna or its common stockholders. A motion for summary judgment filed by Plaintiff November 26, 1967, was withdrawn as moot April 26, 1968. A second motion for summary judgment was filed October 10, 1968, and *for the first time Plaintiff* specifically claimed monetary damages.

14. No damage to Susquehanna or its common stockholders appears of record in this case. That the Susquehanna stockholders exercised a sound, as well as informed, business judgment in approving the merger between Susquehanna and Atlantic Research is shown by the uncontradicted evidence [A-181] concerning the corporate health and strength of Susquehanna as reflected by the increased size of its assets and the increased market valuation of its stock, as follows:

	Susquehanna After Gypsum Merger 12/31/66	Susquehanna After Atlantic Merger 12/31/67	Six Months Period Susquehanna After Atlantic Merger 6/30/68(1)
Sales	$32,687,079	$111,079,141	$ 69,916,000
Operating Income	3,080,105	9,795,117	6,691,000
Net Profit	3,952,953	6,869,161	6,551,000
Net Worth	35,725,970	42,353,631	51,125,000
Total Assets	40,513,325	91,718,736	100,581,000
Shares Outstanding	3,331,201	3,371,222	3,830,521(2)
Earnings Per Share	$1.19	$1.53(3)	$1.50(3)
Stock Price	6-5/8 - 7-7/8 Low Bid High Asked	50-5/8 - 75 American Stock Exchange	66-1/1 - 49-1/2 American Stock Exchange

(1) Includes data arising from merger of Xebec Corporation into Susquehanna in April 1968.

(2) Average common shares outstanding.

(3) Applicable to common stock after deducting preferred dividends.

15. Plaintiff has purchased and sold Susquehanna stock since 1964, with an aggregate profit of over $10,000. On March 29, 1967, Susquehanna [A-182] stock was quoted in the over-the-counter market at 13⅛ bid, 13½ asked. On April 21, 1967 the stock was quoted at 13¼ bid and 13-5 8 asked. In April 1967 Plaintiff owned 900 shares. On April 24, 1967 he sold 500 shares at $12.80 per share. On August 3, 1967, when it became generally known that the Atlantic Research Board of Directors had approved a merger with Susquehanna, Susquehanna stock sold at approximately $34 a share. On October 10, 1967, Plaintiff sold 300 shares of his Susquehanna stock at approximately $45.29 per share. His profit on these 300 shares was approximately $9,500. Eight days later he filed the complaint herein.

16. Plaintiff knew before filing the instant action that the merger proposal was to be submitted to the

Susquehanna stockholders for approval. He made no effort to obtain redress within the corporation, by appeal to the Board of Directors or the stockholders, for the grievances he asserted. Under the Securities and Exchange Commission regulations Plaintiff was entitled to have his contentions submitted to the stockholders in the Joint Proxy Statement (Regulation 240, 14a-8, 19 F.R. 247). Plaintiff did not seek to take advantage of this procedure.

17. In an affidavit filed October 18, 1967, under General Rule 39, Plaintiff, an attorney, is stated to have arranged with counsel representing him to share in any attorney's fee to be allowed herein, on the basis that he helped to prepare the Complaint and that he was expected to perform legal services in connection with preparation of the case.

[A-183] 18. Plaintiff's interests in maintaining the litigation are adverse to those of the class he claims to represent. He stands in a separate class from them. One week before the suit was filed he profited personally from the rise in the price of Susquehanna common stock following announcement of the proposed merger. He seeks to benefit from the suit not only by obtaining attorney's fees but also by relief, if any, the Court might grant. This creates a conflict of interest.

19. Not a single stockholder has intervened or otherwise given any sign of support for Plaintiff's action.

20. To grant the relief prayed for in the Complaint would require a judicial undoing of the Susquehanna-Atlantic Research merger, with consequent ill effects on a great number of third parties who relied in good faith on the validity of the preferred stock and the effectiveness of the merger.

CONCLUSIONS OF LAW

1. The members of the class Plaintiff purports to represent have shown, by their vote to approve the Susquehanna-Atlantic merger and to reject the maintenance of Plaintiff's litigation, that they have repudiated Plaintiff's efforts to represent them. Plaintiff does not "fairly and adequately protect the interests" of the class, within the meaning of FRCP Rule 23(a)(4).

2. Plaintiff's interests in maintaining the litigation conflict with those of the members of the class he purports to represent, and hence |A-184| he does not fairly and adequately protect the interests of the class, under FRCP Rule 23(a)(4).

3. Because this class has exercised an informed business judgment concerning the conduct of Defendants complained of, with respect to the authorization and issuance of the preferred stock and its use in the Susquehanna-Atlantic Research merger, Plaintiff cannot "fairly and adequately protect the interests" of the class, within the meaning of FRCP Rule 23(a)(4).

4. Plaintiff's interests in maintaining the litigation are adverse to those of the class, and Plaintiff's claims are not "typical" of the claims of the class he purports to represent, within the meaning of FRCP Rule 23(a)(3).

5. For each of the reasons set forth in Conclusions 1-4, the action cannot be maintained as a class action.

6. Notice should not be directed to the approximately 9,000 members of the class, on the issue of repre-

sentation, assuming that such notice is authorized by FRCP Rule 23. The members of the class were afforded full notice by the Joint Proxy Statement dated October 26, 1967.

7. Plaintiff is estopped from maintaining this suit and seeking equitable relief.

8. No damage to Susquehanna or its common stockholders has been alleged in the pleadings or can be established on this record.

9. Plaintiff's cause of action, and the equitable relief requested, are moot.

[A-185] 10. The Complaint fails to state a claim upon which relief can be granted. FRCP Rule 12(b)(6).

11. For each of the reasons set forth in Conclusions 6 - 10, the action should be dismissed with prejudice.

12. Plaintiff's motion for summary judgment, filed herein five days prior to the oral argument scheduled on the instant motion of Defendants is moot.

/s/ J. S. Perry

Judge

DATED: Chicago, Illinois,
November 8, 1968.

Supreme Court, U.S.
FILED
JUN 26 1970
E. ROBERT SEAVER, CLERK

in the Supreme Court of the United States

October Term, [redacted] 1970

No. 320

MAURICE H. SCHY,

Petitioner,

vs.

THE SUSQUEHANNA CORPORATION, a Delaware corporation, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSEN, D. W. REEVES, R. C. SCHENK and N. F. TISDALE, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MAURICE H. SCHY
9225 Collins Avenue
Surfside, Florida 33154,
Petitioner pro se.

MIAMI REVIEW — 371-4853 — 377-3721

INDEX

	Page
Opinion Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	4
Statement of the Case	5
Reasons for Granting the Writ	
I. The Court of Appeals, on the issues of causation and damages in an action under 14(a) of the Securities Exchange Act of 1934, failed to follow the law laid down by the Court in *Mills v. Electric Auto-Lite Company*, ____ U.S. ____ (1970); 24 L.ed.2d 593.	9
II. The court's total disregard of the letter of Rules 12(b)(6), 15(a), 15(d) 23.1 and 56, sanctioned by the Court of Appeals, was such as to deny petitioner due process of law.	12

INDEX (cont.)

		Page
III.	The interpretation of Rule 23 by the Court of Appeals, respecting the qualification of a class representative is in conflict with the law prevailing in the Second Circuit.	19
IV.	The decision by the Court of Appeals, based as it was upon a disputed admission not of record, and, hence, beyond review by the Court, represents such departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision.	24
V.	The decision by the Court of Appeals, in that it worsens the disadvantages already imposed by the system on any stockholder who takes his complaint against management to court, offends the concept of "fair play" basic to the American system of jurisprudence and should not be allowed to stand.	25
Conclusion		27
Appendix A — Opinion of Court of Appeals		App. 1
Appendix B — Statutes Involved		App. 11

TABLE OF CITATIONS

CASES

	Page
Anderson National Bank v. Luckett, (1944) 321 U.S. 233	18
Case Company, J. I. v. Borak, (1964) 377 U.S. 426	11, 22
Conley v. Gibson, (1957) 355 U.S. 41	16
Eisen v. Carlisle & Jacqueline, 391 F.2d 555 (2 Cir. 1968)	19
Foman v. Davis, (1962) 371 U.S. 179, 182	18
Gardner v. Toilet Goods Association, (1967) 387 U.S. 162	10
Georgia Southern and Florida Railway Company v. Atlantic Coast Line Railroad Company, 373 F.2d 493 (5 Cir. 1967)	15
Hannah v. Larche, (1960) 363 U.S. 420	18
Hohmann v. Packard Instrument Company, 399 F.2d 711 (6 Cir. 1968)	19
Howard Industries, Inc. v. Rae Motor Corporation, 186 F.Supp. 469 (E.D. Wis. 1960)	25

TABLE OF CITATIONS (cont.)

	Page
LaBuy v. Howes Leather Company, Inc., (1957) 352 U.S. 249	19
Los Angeles Brush Manufacturing Corporation v. James, (1927) 272 U.S. 701	19
Mills v. Electric Auto-Lite Company, ____ U.S. ____ (1970); 24 L.ed.2d 593	9
Mullane v. Central Hanover Bank & Trust Company, (1950) 339 U.S. 306	18
Schroeder v. New York, (1962) 371 U.S. 208	18
Sola Electric Co. v. Jefferson Electric Co., (1942) 317 U.S. 173	11
Surowitz v. Hilton Hotel Corp., (1966) 383 U.S. 363	16
United States v. New Wrinkle, Inc., (1952) 342 U.S. 371	10

TEXTS

31 C.J.S. Evidence §361, p. 1136	25

TABLE OF CITATIONS (cont.)

STATUTES AND RULES

Page

Securities Exchange Act of 1934 (15 U.S.C. §78a et seq.) Sec. 14.(a) ..... App. 11

General Rules and Regulations of the Securities and Exchange Commission Under the Securities Act of 1934 (17 C.F.R. 240)

Rule 14a-8 ..... App. 11

Rule 14a-9 ..... App. 13

Federal Rules of Civil Procedure (28 U.S.C.).

Rule 12(b)(6) ..... App. 14

Rule 15(a) ..... App. 14

Rule 15(d) ..... App. 15

Rule 23(a)(3) ..... App. 15

Rule 23(a)(4) ..... App. 15

Rule 23.1 ..... App. 15

Rule 56(c) ..... App. 16

Rule 56(e) ..... App. 17

in the

Supreme Court

of the

United States

October Term, 1969

No. _____

MAURICE H. SCHY,

Petitioner,

vs.

THE SUSQUEHANNA CORPORATION, a Delaware corporation, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSEN, D. W. REEVES, R. C. SCHENK and N. F. TISDALE, JR.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner MAURICE H. SCHY prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit entered on January 5, 1970.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 419 F.2d 1112 and is reproduced in Appendix A to this Petition.

JURISDICTION

The judgment of the Court of Appeals was entered on January 5, 1970. On January 19, 1970, petitioner filed a petition for rehearing which the Court of Appeals denied by order entered January 27, 1970. On April 11, 1970, petitioner applied to the Honorable Thurgood Marshall, Associate Justice of the Court, for an extension of time to petition for certiorari and the time therefore was enlarged to May 25, 1970. On May 8, 1970, petitioner again applied to the Honorable Thurgood Marshall for an additional extension of time to petition for certiorari and the time therefore was further enlarged to June 26, 1970. The jurisdiction of the Court to review the decision of the Court of Appeals by writ of certiorari is pursuant to 28 U.S.C. §1254(1), 62 Stat. 928.

QUESTIONS PRESENTED

1. Whether the decision of the Court of Appeals on the issues of causation and damages in an action under Section 14(a) of the Securities Exchange Act of 1934, which is contra to the law as declared by the Court, should be allowed to stand?

2. Whether the Court of Appeals has so far sanctioned the court's departure from the accepted and usual course of judicial proceedings as to call for an exercise by the Court of its power of supervision, in view of the following:

(a) The court's dismissal of the complaint with prejudice under Rule 12(b)(6) on a ground not embraced within the ambit of the rule and without granting petitioner an opportunity to file counter affidavits or present material made pertinent to such a motion by Rule 56;

(b) The court's denial of leave to petitioner to amend and supplement his complaint, in order to meet a deficiency in the pleading raised by the court itself upon oral argument on respondents' motion to dismiss, in derrogation of the letter and spirit of Rule 15(a); and

(c) the court's disqualification of petitioner as a class representative by going outside the specific procedures of Rule 23(a)(3) and 23(a)(4) to do so.

(d) the court's improper extension to class actions of Rule 23.1 which, by its terms, is applicable only to derivative suits and not to class actions.

3. Whether the act of disseminating a false proxy statement, pursuant to which those persons who comprised the class of Susquehanna common stockholders on March 29, 1967, authorized a new class of preferred stock, can be purged of all wrong and ratified by different stockholders, to wit, those persons who comprised the class of Susquehanna common stockholders on October 26, 1967, the date of issuance of a different proxy statement, pursuant to which the then common stockholders approved the issuance of the previously authorized preferred stock in consummation of a merger?

4. Whether petitioner is to be disqualified, as a class-plaintiff under Rule 23, from representing those persons who comprised the class of Susquehanna common stockholders on March 29, 1967, and who were deceived by the March 29th P. S. into authorizing a class of preferred stock, on the ground that petitioner's interest is antagonistic to the interests of that class, for the reason that pursuant to the October 26th P. S., 80% of the persons who then comprised the class of Susquehanna common stockholders, approved the issuance of the preferred shares in consummation of a merger?

5. Whether petitioner, a member of the Illinois bar, who performed professional services essential to the prosecution of this action, is disqualified as a class-plaintiff because he may share in fees, if his suit be successful, to an extent allowed by the court?

6. Whether the Court of Appeals should be permitted to go outside the record to affirm; to wit, by basing its decision upon an admission allegedly made by petitioner's counsel in un-recorded oral argument of the case on appeal, which admission petitioner's counsel in the Petition for Rehearing denied having made, when such decision terminated for all time the rights of petitioner and of the more than 9000 members of the class to sue on the deceptive March 29th P. S.?

STATUTES INVOLVED

The statutes involved are Section 14(a) of the Securities Exchange Act of 1934 (Title 15, United States Code, Section 78m). Also involved are Rule 14a-9 of the

Securities and Exchange Commission promulgated pursuant to Section 23(a) of the Securities Exchange Act of 1934 (Title 15, United States Code, Section 78w) and Rules 12(b)(6), 15(a), 15(d), 23.1 and 56 of the Federal Rules of Civil Procedure. These statutes and rules are printed in pertinent part in Appendix B hereto.

STATEMENT OF THE CASE

Petitioner, owner of 100 shares of common stock of The Susquehanna Corporation, a Delaware corporation ("Susquehanna"), on October 18, 1967 brought this action under Rule 23(a) of the Federal Rules of Civil Procedure (the "Rules") on his own behalf and on behalf of the more than 9000 other common stockholders of Susquehanna similarly situated. Respondents were officers and directors of Susquehanna during the period covered by the complaint.

The complaint charged respondents with having caused Susquehanna to disseminate a false proxy statement dated March 29, 1967 (the "March 29th P.S."), in violation of Section 14(a) of the Securities Exchange Act of 1934 and Regulation 14(a)-9 of the Securities and Exchange Commission.

Through the March 29th P. S. respondents sought stockholder approval of a proposed amendment to Susquehanna's charter authorizing a new class of stock consisting of 3,000,000 shares of $5.00 par value preferred, the terms and preferences of which were to be fixed by respondents as the shares were issued. Responsive to the solicitation, the stockholders gave respondents sufficient proxies to effect the charter amendment.

The complaint alleged that respondents were about to seek stockholder approval of a merger of Atlantic Research Corporation, a Virginia corporation ("Atlantic"), into Susquehanna, in which Susquehanna preferred would be exchanged for Atlantic's outstanding common; that the issuance of the preferred on terms then fixed by respondents, to include, inter alia, an annual cumulative dividend of $1.00 per share, a high guaranteed value upon liquidation, conversion privileges and the like, would materially impair the common stockholders' equity position in Susquehanna and that but for the misstatements of material facts in, or the omissions of material facts from, the March 29th P. S., the Susquehanna stockholders would not have given their proxies to respondents, to create the class of preferred, nor would they have surrendered to respondents the valuable right of stockholders to fix the terms upon which a new class of stock would issue.

The complaint sought to void the proxies given pursuant to the March 29th P.S.; to enjoin the calling of a stockholders' meeting to approve a merger with Atlantic involving the issuance of preferred shares and to require a further amendment to the Susquehanna charter, removing therefrom the authorization of the class of preferred stock.

With the complaint, petitioner's counsel filed an affidavit in compliance with Rule 39 of the United States District Court for the Northern District of Illinois, stating that petitioner, a licensed attorney, had performed and would continue to perform professional services in connection with this suit and that he would participate in any legal fee to be allowed petitioner's counsel to the extent determined by the court (A. 33, 33A).

On October 26, 1967, eight days after petitioner had filed his complaint, respondents, jointly with the management of Atlantic, issued a proxy statement (the "October 26th P. S.") wherein they solicited and received sufficient proxies to approve a Susquehanna-Atlantic merger at the November 27, 1967 meetings of stockholders of both corporations. The merger was consummated in December 1967 with the exchange of Atlantic common for Susquehanna preferred, which contained the preferences substantially as set forth above.

The October 26th P.S., under the caption "Litigation Involving Susquehanna" (Vol. 1, Book of Exhibits, B-9, p. 36), referred to petitioner's suit and set forth an abridgment of the complaint, followed by the opinion of Susquehanna's counsel that petitioner's suit was without merit.

On July 1, 1968, respondents filed their answer to the complaint, pleading nine defenses including a traverse and additional defenses (A. 34-53).

On July 17, 1968, respondents filed a motion under Rule 23(c)(1) to discontinue the suit as a class action on the grounds that petitioner could not qualify as a class representative under Rules 23(a)(3) and 23(a)(4) because his claims were not typical of the claims of the class, nor could he fairly and adequately protect the interest of the class and that the majority of the class [by approving the Susquehanna-Atlantic merger] had ratified respondents' conduct about which petitioner complained, [the dissemination of the false March 29th P.S.] and had exercised an informed business judgment not to continue with petitioner's suit. Respondents' motion also asked that the complaint be dismissed on the single ground that petitioner

did not seek redress within the corporation before filing his suit (A. 54, 55). With their motion, respondents' counsel filed a memorandum of law (A. 56-83), to which were appended, as Exhibit "A," parts of the October 26th P. S. deemed relevant and, as Exhibit "B," an affidavit of the secretary of Susquehanna giving the stockholders' vote for and against the proposed merger with Atlantic.

On October 15, 1968, respondents' motion was argued orally (A. 86-144A). Before commencement of the argument the court, *sua sponte*, asked counsel to state their views on what the damages were; whether they were speculative or whether there was a genuine basis for them (A. 89, 90). This was the first time damages became an issue in the case.

Respondents argued that the rise in the market price of Susquehanna common following the Atlantic merger, negatived any damage to the common stockholders (A. 98, 101, 139). Petitioner countered that the priority of the preferred over the common, as to dividends and assets upon liquidation, impaired the common stockholders' equity position in Susquehanna and offered to produce expert testimony to prove that fact (A. 130, 131, 139).

At the conclusion of the oral argument, respondents' counsel tendered to the court a group exhibit consisting of fourteen separate documents, including affidavits by two officers of Susquehanna, aggregating more than four hundred pages of material (Vol. 1, Book of Exhibits). The court permitted the document to be filed in support of respondents' motion (A. 142). Petitioner's counsel then asked that the record show that he had had no opportunity to look at the group exhibit before it was tendered to the court (A. 143).

Immediately after respondents' group exhibit was filed, the court sustained respondents' motion on all grounds therein asserted and on the additional ground that the complaint failed to allege adequately damages to the stockholders (A. 144). Responsive to the direction of the court, respondents' counsel proposed twenty detailed findings of fact and twelve conclusions of law (A. 146-158), to which petitioner's counsel filed objections (A. 159-170).

On November 4, 1968, before the entry of the order dismissing the case, petitioner moved for leave to amend and supplement his complaint to cure what the court, on its own motion, had found to be defective in the complaint. Petitioner's motion was denied (A. 172).

On November 8, 1968, the court adopted verbatim respondents' proposed findings of fact and conclusions of law and dismissed the complaint with prejudice (A. 173-186A).

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals, on the issues of causation and damages in an action under 14(a) of the Securities Exchange Act of 1934, failed to follow the law laid down by the Court in *Mills* v *Electric Auto-Lite Company*, ____U.S.____ (1970); 24 L. ed 2d 593.

The questions of causation and damages in an action under Section 14(a) of the Securities Exchange Act of

1934, were settled by the Court on January 20, 1970, with the publication of its opinion in *Mills*. While *Schy* was yet pending before the Court of Appeals, *Mills* became the law by which this action should have been decided. On January 19, 1970, one day before the Court decided *Mills*; on appeal from the Seventh Circuit, petitioner filed his petition for rehearing with the Court of Appeals. The Court of Appeals; however, chose not to follow *Mills* and, on January 27, 1970, by denying the petition for rehearing, allowed its decision, in derrogation of *Mills*, to stand.

Under *Mills*, the showing of a material misstatement or omission in a proxy statement compels the conclusion that the defect in the proxy statement was of such character that it might have affected the judgment of a stockholder who was in the process of deciding how to vote. 24 L.Ed.2d at 602, 603. The requirement of *Mills*, that the misstatement or omission be shown to be material, in principle was met in *Schy*.

The thrust of petitioner's complaint was that but for the March 29th P. S., deceptive in material respects, the stockholders would not have given their proxies to respondents to be voted in support of an amendment to the Susquehanna charter that authorized a new class of preferred and surrendered to respondents the right to fix the terms and conditions on which the preferred would issue. By the filing of respondents' motion, and for the purposes of the motion, the materiality of the misstatements and omissions in the March 29th P. S. must be taken as proved. *United States v. New Wrinkle, Inc.* (1952) 342 U.S. 371, 376; *Gardner v. Toilet Goods Association* (1967) 387 U.S. 167, 172.

Respondents' purpose in disseminating the false March 29th P. S. was to garner enough proxy support to effect the essential amendment of the Susquehanna charter. The Court of Appeals followed the error of the court in paying no heed to this fact, and thereby failed to recognize that the wrong petitioner sought to right by his complaint, was the frustration, by the false March 29th P. S., of the stockholders' right to exercise freely their corporate franchise on the issue for which their proxies were solicited. This only can account for the ruling by the Court of Appeals, that the chain of causation between the March 29th P. S. and any wrong which may have flowed therefrom, was broken by the October 26th P. S. (419 F.2d at 1117), which presented a completely different issue.

Had the Court of Appeals been attentive to *Mills*, it would have known that causation was present on the face of petitioner's complaint, that it then became petitioner's task to prove it at a trial on the merits (*J. I. Case Company* v. *Borak* (1964) 377 U.S. 426, 431), and the case should have been remanded to the court for that purpose.

The error of the Court of Appeals and of the court, in holding that petitioner suffered no damages because no shares of preferred were issued pursuant to the March 29th P. S. is equally clear. *Mills* has established that the use of a misleading proxy statement itself a violation of the law, is actionable irrespective of financial injury to the stockholders, 24 L.ed.2d at 601. If no money damages were suffered, it remained the duty of the court to fashion an appropriate remedy, to the end that for every federal wrong there be a federal remedy. *Sola Electric Co.* v. *Jefferson Electric Co.* (1942) 317 U.S. 173, 176; *J. I. Case Company* v. *Borak* (1964) 377 U.S. 426, 428.

Petitioner submits that the Court of Appeals, having in a Section 14(a) action decided the questions of causation and damages in conflict with the Court's decision in *Mills*, dispositive of those questions, a writ of certiorari should issue to correct the error of the Court of Appeals.

II. The court's total disregard of the letter of Rules 12(b)(6), 15(a), 15(d) 23.1 and 56, sanctioned by the Court of Appeals, served to deny petitioner due process of law.

On October 25, 1968, respondents submitted to the court twelve proposed conclusions of law. Number 10 of these was that "[t]he complaint fails to state a claim upon which relief can be granted. FRCP, Rule 12(b)(6)." (A. 56-158). This was ten days after the court had decided the case and was the first intimation to petitioner that respondents' motion to dismiss — on the sole ground that petitioner had failed to seek redress within the corporation before filing his complaint[1], had by mysterious judicial alchemy been converted into a motion to dismiss under Rule 12(b)(6) for failure to state a claim upon which relief could be granted. The court adopted verbatim these proposed conclusions of law (A. 183-185) over petitioner's timely objections (A. 166-170).

Rule 12(b)(6) is explicit. It empowers the court to dispose of litigation summarily and with the finality of a trial on the merits only if the conditions of the rule are met. There is no dispute as to what these conditions are: (1), the motion to dismiss must be on the ground that the

[1] A ground abandoned by respondents in the Court of Appeals (Applt's reply brief, p. 4).

complaint fails to state a claim upon which relief may be granted; (2), the motion must be made before the defendant has answered and (3), matters outside the pleading must be presented to and not excluded by the court. Only if these conditions are met may the motion become one for summary judgment, in which event, pursuant to Rule 56, due process is assured by the mandate that all parties be given reasonable opportunity to present all material made pertinent to such a motion.

Not one of the conditions precedent required by Rule 12(b)(6) was present. Nothing that transpired prior to October 25th served to put petitioner on notice that he was to be confronted — much less dismissed — by summary judgment. Respondents had moved to dismiss solely on the ground of petitioner's failure to seek redress within the corporation, a ground not within the ambit of Rule 12(b)(6)[2]. Moreover, respondents had answered the complaint before moving to dismiss, an act pre-empting summary relief under the express terms of the rule. And perhaps of most significance, petitioner was afforded no opportunity to file counter affidavits or to present other material made pertinent to a motion for summary judgment by Rule 56.

---

[2]The reasoning of the Court of Appeals on this point reflects nothing short of zeal to affirm patent error. After acknowledging that a dismissal on the single ground asserted by respondents must be without prejudice, it proceeded to invoke the first of several non-sequitors, this one being that a motion to dismiss based upon lack of damages may be treated as a motion to dismiss under Rule 12(b)(6). (419 F.2d at 1115). No motion to dismiss for lack of damages had ever been made in this action and, even if such a motion had been made, the Court of Appeals knew or should have known from *Mills*, that a failure to allege monetary damage is not a ground for summary dismissal of a complaint charging the dissemination of a false proxy statement. (24 Led 2d at 603).

Petitioner seasonably objected to conclusion of law No. 10, on the ground that there had been no compliance with the requirements of Rule 12(b)(6), absent which the court could dismiss, with prejudice, only erroneously (A. 170). The objection was not sustained. On appeal the errant dismissal with prejudice was presented as a distinct issue and was argued with vigor (Applt's Br. pp. 47-50). That petitioner was given no opportunity to file counter affidavits, a mandate of Rules 12(b)(6) and 56, if a motion to dismiss is to be treated as a motion for summary judgment, the Court of Appeals passed without comment.

What were the "matters outside the pleadings presented to and not excluded by the court?" The question is not rhetorical. The record is far from clear that the group exhibit (Vol. 1, Book of Exhibits) filed by respondents in support of their motion just moments before the court decided the case (A. 142-144) were matters outside the pleadings. The Court of Appeals, nevertheless, in its zeal to affirm, accepted from that exhibit the affidavit of James W. Crowley, secretary of Susquehanna (Vol. 1, Book of Exhibits, Tab B, p. 3) which merely "identified" the October 26th P.S. (419 F.2d at 1116), as competent qualification for a 108 page document upon which the Court of Appeals substantially based its entire opinion.

The total disregard by the court of the requirements of Rules 12(b)(6) and 56, that petitioner have a reasonable opportunity to file counter affidavits to meet the thrust of the group exhibit, deprived petitioner of a right vital to the survival of his complaint.

The determination by the Court of Appeals that petitioner waived his right to file counter affidavits because

he did not object to the group exhibit as untimely is erroneous both on the facts and the law. Petitioner's counsel requested that the record show the group exhibit had just been presented and that he had had no opportunity to look at it (A. 143). Counsel's failure to use the word "untimely" does not alter the clear import of his statement. Moreover, even in the absence of vigilance, the right to file counter affidavits under these circumstances is basic to due process and is preserved by the rule itself. In *Georgia Southern and Florida Railway Company* v. *Atlantic Coast Line Railroad Company*, 373 F.2d 493 (5 Cir. 1967) the Court said at 498:

> "The notice requirements of Rule 12 guarantee that the automatic change of a motion to dismiss into a motion for summary judgment will not be accomplished by an unforceable thrust with no chance to parry. Notice is ascendant and primary in the Federal Rules. They do not tolerate foils of obfuscation."

There are left then to consider as "matters outside the pleadings" only Exhibits "A" and "B", which respondents attached to the memorandum of law filed with their motion. Exhibit "A" consisted of selected parts of the October 26 P.S., deemed relevant by respondents. Exhibit "B" was an affidavit by James Crowley, Secretary of Susquehanna, which only certified the vote on the Atlantic merger. These exhibits are before the Court in Vol. 2, Book of Exhibits.

Respondents contended in the Court of Appeals that Exhibits "A" and "B" were matters outside the pleadings (Aplees' Br., p. 37). This clearly could not be so because

the two exhibits were attached to respondents' memorandum of law, which was itself attached to and made a part of respondents' motion by the express provisions thereof (A. 55). Because respondents grounded their motion, inter alia, on ". . . other reasons more fully set forth in the attached memorandum" (A. 55), petitioner construed the memorandum, with Exhibits "A" and "B" expressly made a part thereof, as a part of the pleading rather than as "matters outside the pleadings presented to and not excluded by the court". Petitioner's construction is logical and reasonable. But even if it was erroneous it did not afford a basis under the Rules to deprive petitioner of his day in court:

> "The Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits." *Conley v. Gibson* (1957), 355 U.S. 41, 48.

Even in retrospect, whether Exhibits "A" and "B" were part of or outside the pleadings is not clear. But in retrospect, the studied ambiguity with which they were proferred by the respondents and the alacrity with which the court put them to such devastating use makes it clear that both the respondents and the court employed the Rules as a snare, a practice condemned by the Court in *Surowitz* v. *Hilton Hotel Corp.*, (1966) 383 U.S. 363, 373:

> "The basic purpose of the Federal Rules is to administer justice through fair trials, not through summary dismissals as necessary as they may be on occasion. These rules were designed in large

> part to get away from some of the old procedural booby traps which common-law pleaders could set to prevent unsophisticated litigants from ever having their day in court. If rules of procedure work as they should in an honest and fair judicial system, they not only permit, but should as nearly as possible guarantee that bona fide complaints be carried to an adjudication on the merits."

In addition to the court's abuse of Rules 12(b)(6) and 56, its abuse of other Rules served to deny petitioner his day in court. Respondents' sole ground for dismissal of the complaint was the failure of petitioner to seek redress within the corporation before filing his action (A. 55). This was expanded in their memorandum of law (A. 81, 82) and in their argument before the court (A. 97) to mean, inter alia, that petitioner was obligated to lay his grievances before the directors or stockholders of Susquehanna and that only after they had refused to bring an action could petitioner proceed on his own. The court, persuaded by this argument, found that petitioner had failed to ask the directors or stockholders to take action against respondents (Finding No. 16) and concluded that petitioner was therefore estopped to bring this action (Conclusion of law No. 7, A. 184).

Petitioner's action was a class action, governed by Rule 23, and not a derivative action, governed by Rule 23.1. The application of Rule 23.1 only to derivative suits is so clear that the court's extension of that Rule to support the dismissal of this class action evidences a flagrant disregard for the Rules, a disregard shared by the Court of Appeals, which refused to face this issue, squarely

raised by petitioner, and which instead begged the question by holding that prematurity of suit may be raised by summary judgment (419 F.2d at 1115).

Respondents' other prematurity argument, that petitioner did not pursue his rights under Rule 14a-8 of Regulation 14 of the Securities and Exchange Commission, is completely without merit (Cf. Applt's Br., pp. 36, 37) and was abandoned by respondents in the Court of Appeals (Cf. Applt's Reply Br., p. 4).

The court's denial of leave to petitioner to amend and supplement his complaint under Rule 15(a) and 15(d), because it came too late (Tr. Nov. 7, p. 7), was, under the facts of this case, a denial of the mandate of the rule, that leave to amend shall be freely given when justice so requires. *Foman* v *Davis*, (1962) 371 U.S. 179, 182.

Although "due process" is an elusive concept (*Hannah* v *Larche*, (1960) 363 U.S. 420, 442), it is fundamental to that concept that a litigant have an opportunity to be heard upon such notice and proceedings as are adequate to safeguard the right for which the constitutional protection is invoked. *Anderson National Bank* v *Luckett*, (1944) 321 U.S. 233, 246; *Schroeder* v *New York*, (1962) 371 U.S. 208, 211; *Mullane* v *Central Hanover Bank and Trust Company*, (1950) 339 U.S. 306, 314.

Petitioner submits that the court and the Court of Appeals have so far departed from the accepted and usual course of motion practice as to amount to a denial of procedural due process to petitioner. The serious charges of fraud in petitioner's complaint, amplified in his

amended and supplemental complaint, are now not to be heard because the court and the Court of Appeals have virtually nullified the Rules.

The Court has been vigilant to enforce these Rules to insure the orderly and just conduct of litigation in the federal courts. *Los Angeles Brush Manufacturing Co.* v. *James*, (1927) 272 U.S. 701, 707; *La Buy* v. *Howes Leather Co.*, (1957) 352 U.S. 249, 256. The courts need to be reminded that the Rules bind them as well as litigants. Vigilance should require that a writ issue here; otherwise petitioner will have been deprived of his day in court.

III. The interpretation of Rule-23 by the Court of Appeals, respecting the qualification of a class representative, is in conflict with the law prevailing in the Second Circuit.

The decision of the Second Circuit in *Eisen* v *Carlisle & Jacqueline*, 391, F.2d 555 (1968), on the question of the qualifications of the class representative under Rule 23 as it exists today, has been followed by many courts, including the Seventh Circuit (*Hohmann* v *Packard Instrument Company*, 399 F.2d 711 (1968), and must be regarded as a leading case. The Seventh Circuit in *Schy*, however, departed from *Eisen* and from *Hohmann*, leaving conflict in its wake, which should be resolved by the Court.

Eisen urged that Rule 23 be given a liberal rather than a restrictive interpretation and abhorred the quick disqualification of a class plaintiff, saying that "* * * the dismissal *in limine* of a particular proceeding as not a proper class action is justified only by a clear showing

to that effect and after a proper appraisal of all the factors enumerated on the face of the rule itself." (391 F.2d at 546).

Eisen was brushed aside by the court when it did not, in the first instance, look to the rule itself. The rule requires only that the claims of the representative be typical of the claims of the class and that the representative will fairly and adequately represent the class. By these standards petitioner was a qualified representative. The complaint charged that petitioner's right to the free exercise of his corporate franchise was denied him by the false March 29th P.S. If the March 29th P.S. were in fact false, and it must have been so taken for the purposes of respondents' motion, petitioner's claim was typical, albeit identical, with the claim of every other person who owned Susquehanna stock on March 29, 1967. But the court went beyond the rule itself and considered additional circumstances and facts.[3] This was approved by the Court of Appeals (419 F.2d at 1116) and it is in this respect that *Schy* is in conflict with *Eisen*.

The court determined that stockholder approval of the Susquehanna-Atlantic merger, pursuant to the October 26th P.S., *a priori* established petitioner's interests to be antagonistic to the interest of the class. To have made this determination the court had to resolve other questions of fact and of law, some of sweeping effect.

Were the stockholders fully informed by the October 26th P.S.? The October 26th P.S. was a printed document.

[3] At the posture of the case before the court, the court was not passing on questions of fact. "* * * we are not here on the question of facts * * *" (A. 142, 143).

of 108 pages. Under the caption "Litigation Involving Susquehanna", respondents published a terse and complex summary of the allegations of petitioner's complaint, concluding with the short and simple opinion of counsel for Susquehanna that petitioner's suit was without merit. The court could only guess to what extent more than nine thousand stockholders, some of them surely uneducated and unsophisticated, were persuaded against petitioner's position by counsel's opinion that his suit was without merit. Yet to have held that the October 26th P.S. fully informed the stockholders of petitioner's claims, the court had to assume that counsel's opinion was totally without effect. The basis for such an assumption raises a question, since there were no facts of record to aid the court.

Who were the members of the class? Petitioner represented the class made up of stockholders on March 29, 1967. Susquehanna stock was actively traded on the American Stock Exchange. Reason would support the conjecture that many persons who owned the stock on March 29th were not stockholders on October 26. The "class" of stockholders surely changed in seven months. But to have repudiated petitioner as representative of the March 29 stockholders, the court had to conclude that no change in the class membership had occurred.

Can stockholders, however informed they may be, ratify an act declared by Congress to be against the public policy of the United States? Respondents contended that the stockholders ratified their conduct, about which petitioner complained in his suit (A. 54), when, pursuant to the October 26 P.S., they approved the issuance of preferred stock in the Atlantic merger. The conduct about which petitioner complained was respondents' dissemina-

tion of the false March 29th P.S., an act made criminal by the federal securities law and against the public policy of the United States. *No court before the court in* Schy *has ever held that such an act could be ratified.* Under *Schy*, it is now the law that the dissemination of a false proxy statement can be purged of all wrong by a subsequent proxy statement relating to a different issue and issued many months later to a different group of stockholders. Any semblance of such doctrine threatens to have a profound effect on the enforcement of Section 14(a).

The court also faulted petitioner as a class plaintiff, put him in a class separate from that of all other Susquehanna stockholders, because his counsel had agreed to share with him, subject to the approval of the court, any fee which might have been allowed petitioner's counsel upon a successful prosecution of this case. Petitioner, an attorney licensed to practice law in Illinois, had performed and would continue to perform professional services in connection with the case. The value of his services, as evaluated by the court, would measure the extent of his fee participation. Had the court followed *Eisen* or *Hohmann* and looked to Rule 23 to judge petitioner's capacity to represent the class, petitioner would not have been disqualified. That a class plaintiff-attorney might receive a fee does not make his claim atypical of the claims of the class nor does it diminish his ability to protect the interests of the class fairly and adequately, the criteria of the rule.

The Court has recognized in *J. I. Case Company* the importance of the class and derivative suit as an adjunct to the Securities and Exchange Commission in the enforcement of the federal securities laws. Derivative and class

actions are characteristically difficult and prolonged. Very few attorneys are willing to undertake them without substantial retainer-fees. That requirement eliminates, for the most part, all but the affluent litigant. Petitioner in this instance was able to retain counsel only on the condition that he, as an attorney, would assist them with the case. In the light of the purpose of the securities laws, there is cruel irony in the finding below, sanctioned by the Court of Appeals, that a small stockholder who happens to be professionally equipped to protect his interests and those of other small stockholders is disqualified on the ground that the mere contemplation of a fee, in the event he proved that management had bilked the stockholders, created a conflict of interest between him and the other stockholders.

Lawyers are frequently owners of stock. The securities laws extend to the protection of their interests as stockholders as well as to others. No reasonable reason exists to disqualify them as class plaintiffs because they may be paid a fee for professional services rendered in the case. To so disqualify them unreasonably deprives a large group of persons from suing in a representative capacity. It militates against the purpose of the securities laws.

The court decided these many questions of fact based upon the skimpiest of affidavits, which at best did no more than identify the October 26th P.S. (419 F.2d at 1116). This was the very pitfall *Eisen* warned against and points to the wisdom of that decision. Petitioner submits that *Eisen* and *Schy* are in conflict on a question important to all class actions that may be hereafter brought, a conflict which should be resolved by the Court.

IV. The decision of the Court of Appeals, based as it was upon a disputed admission not of record and, hence, beyond review by the Court, represents such departure from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision.

Three times in its opinion the Court of Appeals stated that petitioner's counsel, at the oral argument of the appeal, admitted that the October 26th P.S. was accurate, complete and fair. Both on the question of the court's summary dismissal of the complaint with prejudice under Rule 12(b)(6) and on the question of causation (419 F.2d at 1116, 1117), the Court of Appeals relied heavily upon this alleged admission as a basis to affirm.

It was a matter of consequence to petitioner that the reality of the alleged admission did not go unchallenged. In the Petition for Rehearing filed in this cause, petitioner's counsel denied having made the admission, or having made any statement tantamount to such admission, and recalled to the Court of Appeals his characterization of the October 26th P.S. as a document " . . . shot through with lies or words of similar import." (Petn. for Rehearing, p. 10).

No transcripts are made of oral arguments in the Seventh Circuit. Even assuming *arguendo* the admission was made, it is not known whether it was made in the heat of argument, or responsive to a question by one of the judges; whether it was distinct and formal, for the purpose of dispensing with proof of some fact, or made under other circumstances or for other reasons. Circumstances

such as these, none of which are known here, are essential to a determination of whether a case may turn upon an admission by counsel. *Howard Industries, Inc.* v. *Rae Motor Corporation*, 186 F.Supp. 469, 471 (E.D. Wis. 1960); 31 C.J.S. Evidence 361, pp. 1136, 1137.

It is of record, however, that petitioner's counsel denied having made the admission and without it the Court of Appeals would have been even more hard pressed to affirm. Petitioner submits that a decision of a Court of Appeals, dependent upon the fact of an admission that has been formally denied and which cannot be proved in the absence of a record, and which therefore cannot be reviewed by the Court, should not be permitted to stand.

V. The decision by the Court of Appeals, in that it worsens the disadvantages already imposed by the system on any dissident stockholder who takes his complaint against management to court, offends the concept of "fair play" basic to the American system of jurisprudence and should not be allowed to stand.

The system is such that any dissident stockholder who takes his complaint to court is greatly disadvantaged. At the inception, he must retain counsel out-of-pocket whereas management is defended out of the corporate till. As pointed out elsewhere in this petition, this alone serves in most instances to eliminate all but the affluent and greatly reduces the effectiveness of private litigation as an adjunct to the work of the Securities and Exchange

Commission. In this case, respondents' general counsel is an attorney with enormous experience and political influence. His experience in the defense of management charged by the government and by stockholders with violating the securities laws is described in the October 26 P.S. (Vol. 1, Book of Exhibits, B-9, pp. 46-49). His political influence is a matter of common knowledge of which the Court can take judicial notice. On September 30, 1968, which happened to be the day before this case was argued before the Court of Appeals, the *Chicago Daily News* carried a nationally syndicated article which stated in part, "His is the firm to do business with if you want to get through to the present administration." The *Wall Street Journal* on February 7, 1969 included among the assets of his law-firm " . . . the confidence of officials who count and speedy access to their offices to present a client's case."

Petitioner makes no claim that respondents' case was presented anywhere but in the courtroom. However, the decision by the Court of Appeals, in disqualifying petitioner as a class plaintiff and thereby depriving more than 9,000 stockholders of any representation, on the motion of respondents who not only admitted the wrong to stockholders complained of, but who are represented by counsel of such power and prestige, serves to worsen the disadvantages already imposed by the system on any dissident stockholder who takes his complaint to court.

In this respect the decision by the Court of Appeals opposes the purpose of the securities law and offends the concept of "fair play" that is basic to the American system of jurisprudence. It should not be allowed to stand.

CONCLUSION

The decision by the Court of Appeals reflects a gap between purpose and practice in the adjudication of the rights of dissident stockholders pursuant to the securities laws.

In allowing the interests of more than 9,000 stockholders to stand unprotected against the admitted wrongdoing of the respondents, in order to disqualify petitioner as a class plaintiff, it squarely contravenes the purpose of the securities laws.

In depriving a large class of stockholders, namely attorneys, of the right to sue in a representative capacity because they may receive a fee for the work they perform, it greatly reduces the effectiveness of private litigation as an adjunct to the work of the Securities and Exchange Commission.

It sanctions the abuse of the federal rules to the extent that petitioner has been deprived of due process of law.

It warrants the granting of certiorari by the Court.

Respectfully submitted,

Maurice H. Schy
Petitioner pro se
9225 Collins Avenue
Surfside, Florida 33154

APPENDIX "A"

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

September Term, 1969 September Session, 1969

No. 17,393

MAURICE H. SCHY,

Appellant,

v.

The Susquehanna Corporation, a Delaware corporation, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSEN, D. W. REEVES, R. C. SCHENK and N. F. TISDALE, JR.,

Appellees.

January 5, 1970

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

Before KNOCH and CUMMINGS, *Circuit Judges*, and GORDON, *District Judge*.

GORDON, *District Judge*.[1] This action was brought

[1]The writer of this opinion is sitting by designation from the district court for the Eastern District of Wisconsin.

for equitable relief from an alleged violation of §14(a) of the Securities and Exchange Act, 15 U.S.C. §78n, and the applicable regulation. The district court dismissed the complaint with prejudice and denied leave for the plaintiff to file an amended complaint.

The plaintiff is one of 9,145 stockholders of the Susquehanna Corporation. In his complaint, he has alleged that Susquehanna issued a false and misleading proxy statement on March 29, 1967. The purpose of that statement was to obtain stockholder approval of a proposed new issue of Susquehanna preferred stock. The plaintiff claimed that Susquehanna failed in the proxy statement of March 29 to inform stockholders of a planned merger with Atlantic Research Corporation and of the intended use of the new preferred stock to carry out such merger.

Although a majority of the shares outstanding were voted to approve the new stock issue, no preferred shares were issued pursuant to the proxy statement of March 29. On August 2, 1967, the board of directors of Susquehanna approved a merger with Atlantic Research Corporation; on October 18, 1967, the plaintiff filed his complaint.

On October 26, 1967, Susquehanna and Atlantic issued a joint proxy statement. Like Susquehanna's proxy statement of March 29, this joint proxy statement also sought authorization for a new issue of preferred stock. The proxy statement also outlined the stock's contemplated use in effectuating the merger of the two companies, and it fully described the terms of the proposed new issue of the stock and of the merger. It further described, in ample detail, the plaintiff's pending law suit. At the oral argument of this appeal, the plaintiff's counsel acknowl-

edged that the joint proxy statement was accurate and complete. On November 27, 1967, the stockholders approved the plan described in the joint proxy statement dated October 26 by a vote of 80.8% to 0.42%.

The plaintiff filed a motion for summary judgment which he thereafter withdrew but later renewed. The defendants also filed a motion in which they applied for an order that the plaintiff could not maintain his action as a class action and also to dismiss on the ground that the plaintiff had failed to seek redress from the stockholders before instituting his action.

Following a hearing on the defendant's motion, the district judge rendered an oral opinion granting such motion on the grounds stated in the motion and on the additional ground, raised at the oral argument, that the plaintiff, as a matter of law, was unable to show any damage resulting from the alleged fraudulent proxy statement. Later, a judgment was entered dismissing the action on the merits.

The plaintiff owns 100 shares of Susquehanna stock. He is an attorney and has aided in preparation of this suit. He has an arrangement with his attorneys whereby he will share in the attorneys' fees should he prevail in the action.

I. PROBLEMS OF MOTION PRACTICE

The plaintiff contends that the defendants' motion could not be construed as a motion under rule 12(b)(6) to dismiss for failure to state a claim upon which relief can be granted. For that reason, he argues, the motion could not be treated as a motion for summary judgment under rule 12(b). We reject this contention.

The defendants' motion charged that the plaintiff's suit was premature for failure to seek redress within the corporation. Prematurity may be raised on a motion to dismiss under rule 12(b)(6), but a dismissal granted upon this ground alone must be without prejudice. *Tademy v. Scott et al*, 157 F.2d 826, 828 (5th Cir. 1946); *Van Horn v. State Farm Mutual Automobile Insurance Co.*, 283 F. Supp. 260, 261 (E.D. Mich. 1966), affirmed 391 F.2d 910.

In addition, a motion to dismiss based upon a lack of damages, may properly be treated as a motion to dismiss under rule 12(b)(6). In *Premier Malt Products Co. v. Kasser*, 23 F.2d 98, 99 (E.D.Pa. 1927), the court observed:

> "There must be both the injuria and the damnum to give a legal cause of action, and this remains true notwithstanding the legal fiction of nominal damages. Indeed, this truth made the legal fiction logically necessary."

Accord, *Citrin v. Greater New York Industries*, 79 F. Supp. 692, 694-5 (S.D.N.Y. 1948); *Package Closure Corporation v. Sealright Co.*, 4 F.R.D. 114, 116 (S.D.N.Y. 1943). The plaintiff states that defendants were not entitled to raise the question of damages at the hearing on their motion. The matter of damages would appear to have been improperly raised at the hearing as a ground for dismissal since the defendants had not mentioned it in their notice of motion. See *McNichols v. Lennox Furnace Co.*, 7 F.R.D. 40, 42-3 (N.D.N.Y. 1947). However, the plaintiff fully argued this ground at the hearing and cannot complain here that the district court considered it. *DeLorenzo v. Federal Deposit Insurance Corporation*, 268 F.Supp. 378, 381 (S.D.N.Y. 1967); *Interlego, A. G. v. Leslie-Henry Co.*, 214 F.Supp. 238, 240 (M.D. Pa. 1963).

The plaintiff also contends that even if properly construed as a motion to dismiss under rule 12(b)(6), the defendants' motion may not be treated as a motion for summary judgment since it was made after the answer had been filed. This argument is without merit. A motion to dismiss made after the filing of an answer serves the same function as a motion for judgment on the pleadings and may be regarded as one. *United States for Use of E. E. Black Limited v. Price-McNemar Construction Co.*, 320 F.2d 663, 664 n. 1 (9th Cir. 1963); *Kenemer v. Arkansas Fuel Oil Co.*, 151 F.2d 567, 568 (5th Cir. 1945). Cf. *In re Union National Bank & Trust Co. of Souderton, Pa.*, 287 F. Supp. 431, 433 (E.D. Pa. 1968). Rule 12(c) concerns motions "after the pleadings are closed" and specifically provides that a motion for judgment on the pleadings filed with supporting affidavits may be treated as a motion for summary judgment.

The plaintiff next complains that the district court erroneously considered affidavits and exhibits filed on the day of the hearing in violation of rule 6(d), Federal Rules of Civil Procedure. The plaintiff did not complain of untimeliness in the trial court, although he did urge the court not to consider the exhibits as evidence. Since the plaintiff did not complain about the late filing in the trial court, he cannot do so on appeal.

The plaintiff further contends that the district court should not have considered the October 26, 1967 proxy statement in rendering its decision. He argues that the copy filed in support of the defendants' motion did not comply with the requirements of rule 56(e) and, thus, did not constitute a sufficient affidavit. We reject the plaintiff's contention. The plaintiff has admitted that the Octo-

ber 26, 1967 proxy statement is complete and accurate; he does not deny that the copy submitted with the motion is an accurate copy of the October 26, 1967 proxy statement. An officer of Susquehanna in a separate affidavit identified the attached proxy statement. In *Pollack v. City of Newark, N. J.*, 147 F.Supp. 35, 39 (D. N.J. 1956), affirmed 248 F.2d 543, certiorari denied 355 U.S. 964, the district court said:

> "Moreover in considering a motion for summary judgment, the court is entitled to consider exhibits and other papers that have been identified by affidavit or otherwise made admissible in evidence."

See *Barker* v. *Summey*, 185 F. Supp. 298 (N.D. Ind. 1960); *Hartford Accident and Indemnity Co.* v. *Flanagan*, 28 F. Supp. 415 (S.D. Ohio 1939).

Finally, the plaintiff urges that the district court should not have made a determination under rule 23(c), Federal Rules of Civil Procedure, as to whether the plaintiff could maintain his suit as a class action without having first given notice to members of the class that the court planned to make such a determination.

The Committee Note of 1966, quoted in 3B, *Moore's Federal Practice*, ¶23.01[11.-1], page 23-32, states:

> "Whether the court should require notice to be given to members of the class of its intention to make a determination, or of the order embodying it, is left to the court's discretion under subdivision (d)(2)."

In our opinion, the trial court did not abuse its discretion by refusing to order that notice be given of its intention to make a determination when every member of the class has already received a proxy statement containing a full, accurate and complete description of the pending action. Cf. *Snyder* v. *Board of Trustees of the University of Illinois*, 286 F. Supp. 927, 931 (N.D. Ill. 1968).

In conclusion, we hold that the procedure followed by the district court in granting summary judgment did not involve reversible error. We will now consider the propriety of the substantive rulings.

II. MAINTENANCE OF CLASS ACTION

The plaintiff contends that he could properly represent the class. We disagree and hold that the district court correctly found that this action could not be maintained as a class action.

In determining the adequacy of representation, the district court is not confined to the specific procedure outlined by rule 23. It was proper to consider the additional circumstances and facts of the case. After being fully informed of the nature of the plaintiff's pending suit, 80.8% of the stockholders voted in favor of the proposal made in the October 26, 1967 proxy statement, thereby approving the issuance of preferred stock for use in effectuating the merger. Only 0.42% voted against it. Since over eighty percent of the class voted in favor of the proposal of which the plaintiff's suit complains, and they did so with full knowledge of the plaintiff's suit, it is somewhat difficult for the plaintiff to claim that he represents the class.

The plaintiff cannot maintain his action as a class suit when his interests are antagonistic to the interests of the persons he purports to represent. *Hansberry* v. *Lee*, 311 U.S. 32, 44-5 (1940); *Carroll* v. *American Federation of Musicians of U.S. and Can.*, 372 F.2d 155, 162 (2d Cir. 1967), judgment vacated on other grounds, 391 U.S. 99 (1968); *Troup* v. *McCart*, 238 F.2d 289, 294 (5th Cir. 1956).

III. CAUSATION

The defendants maintain that the district court found that the October 26, 1967 proxy statement broke the chain of causation between the earlier proxy statement and any damage allegedly caused by it. The plaintiff denies that this issue was raised in the district court and objects to considering it on this appeal; he insists that causation is a fact issue which must be settled by a trial.

Since this issue can be resolved on the basis of affidavits which were filed in the district court and were considered in its decision, it may be raised and settled here. In *Reinstine* v. *Rosenfield*, 111 F.2d 892, 894 (7th Cir. 1940), the court said:

> "From time immemorial Courts of Appeal have been authorized to affirm the rulings of lower courts for any valid reason based upon the evidence, although not assigned."

No shares of preferred stock were ever issued pursuant to the March 29, 1967 proxy. The shares which were issued and used to effectuate the merger were issued in response to the October 26, 1967 proxy, which the plaintiff admits was fair and complete.

Under the foregoing circumstances, we believe the district court correctly held that as a matter of law, no damage was caused by the March 29, 1967 proxy. *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 430-1 (1964) and *Mills* v. *Electric Autolite Company*, 403 F.2d 429, 435-6 (7th Cir. 1968), certiorari granted, 394 U.S. 971, referred to by the plaintiff, are distinguishable in that they involved factual disputes. Compare also *Swanson* v. *American Consumer Industries, Inc.*, 415 F.2d 1326 (7th Cir. 1969). Here there was no influence from the March 29, 1967 proxy statement which was unremedied by the October 26, 1967 proxy statement.

IV. CONCLUSION

Shortly before the beginning of oral argument, counsel for the defendant submitted certain documents to the court with the request that the court consider them in connection with this appeal. Counsel for the plaintiff objected to this offer on the ground that it was not timely made. The court is of the opinion that the objection of the plaintiff is well taken and, accordingly, has not considered such documents in deciding this appeal.

Since we find sufficient grounds to support the judgment of the district court, it is unnecessary to consider certain other lesser errors which the appellant has raised.

The judgment of the district court is affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX "B"

CITED STATUTES

SECURITIES ACT OF 1934 (15 U.S.C.A. §78a-78hh-1)

"PROXIES

Sec. 14. (a) It shall be unlawful for any person, by the use of the mails or by any means or instrumentality of interstate commerce or of any facility of a national securities exchange or otherwise, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors, to solicit or to permit the use of his name to solicit any proxy or consent or authorization in respect of any security (other than an exempted security) registered pursuant to section 12 of this title."

GENERAL RULES AND REGULATIONS OF THE SECURITIES AND EXCHANGE COMMISSION UNDER THE SECURITIES ACT OF 1934 (17 CFR 240)

"REGULATION 14A

SOLICITATION OF PROXIES

* * *

Rule 14a-8. Proposals of Security Holders.

(a) If any security holder entitled to vote at a meeting of security holders of the issuer shall submit to the management of the issuer, within the time hereinafter

specified, a proposal which is accompanied by notice of his intention to present the proposal for action at the meeting, the management shall set forth the proposal in its proxy statement and shall identify it in its form of proxy and provide means by which security holders can make the specification provided for by Rule 14a-4(b). The management of the issuer shall not be required by this rule to include the proposal in its proxy statement for an annual meeting unless the proposal is submitted to the management not less than 60 days in advance of a day corresponding to the first date on which the management's proxy soliciting material was released to security holders in connection with the last annual meeting of security holders, except that if the date of the annual meeting has been changed as a result of a change in the fiscal year, a proposal shall be submitted a reasonable time before the solicitation is made. A proposal to be presented at any other meeting shall be submitted to the management of the issuer a reasonable time before the solicitation is made. This rule does not apply, however, to elections to office or to counter proposals to matters to be submitted by the management.

(b) If the management opposes the proposal, it shall also, at the request of the security holder, include in its proxy statement a statement of the security holder, in not more than 100 words, in support of the proposal, which statement shall not include the name and address of the security holder. The proxy statement shall also include either the name and address of the security holder or a statement that such information will be furnished by the issuer or by the Commission to any person, orally or in writing as requested, promptly upon the receipt of any oral or written request therefor. If the name and address

of the security holder is omitted from the proxy statement, it shall be furnished to the Commission at the time of filing the management's preliminary proxy material pursuant to Rule 14a-6(a). The statement and request of the security holder shall be furnished to the management at the same time that the proposal is furnished. Neither the management nor the issuer shall be responsible for such statement."

"Rule 14a-9. False or Misleading Statements.

(a) No solicitation subject to this regulation shall be made by means of any proxy statement, form of proxy, notice of meeting, or other communication, written or oral, containing any statement which, at the time and in the light of the circumstances under which it is made, is false or misleading with respect to any material fact, or which omits to state any material fact necessary in order to make the statements therein not false or misleading or necessary to correct any statement in any earlier communication with respect to the solicitation of a proxy for the same meeting or subject matter which has become false or misleading."

FEDERAL RULES OF CIVIL PROCEDURE

(28 U.S.C.A.)

"Rule 12. Defenses and Objections — When and How Presented — by Pleadings or Motion — Motion for Judgment on Pleadings.

* * *

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter . . . . (6) failure to state a claim upon which relief can be granted . . . . If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

"Rule 15. Amended and Supplemental Pleadings.

(a) Amendments. A party may amend his pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, he may so amend it at any time within 20 days after it is served. Otherwise a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within 10 days after service of the amended pleading, whichever period may be the longer, unless the court otherwise orders.

* * *

(d) Supplemental Pleadings. Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit him to serve a supplemental pleading setting forth transactions or occurrences or events which have happened since the date of the pleading sought to be supplemented. Permission may be granted even though the original pleading is defective in its statement of a claim for relief or defense. If the Court deems it advisable that the adverse party plead to the supplemental pleading, it shall so order, specifying the time therefor."

"Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if *** (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

"Rule 23.1. Derivative Actions by Shareholders.

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall be verified and shall allege (1) that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter de-

volved on him by operation of law, and (2) that the action is not a collusive one to confer jurisdiction on a court of the United States which it would not otherwise have. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The derivation action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs."

"Rule 56. Summary Judgment.

* * *

(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

* * *

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing advidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated herein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits."

LIBRARY
SUPREME COURT, U. S.

e Court, U.S.
E D
JUL 24 1970
T SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 320

MAURICE H. SCHY,

Petitioner,

v.

THE SUSQUEHANNA CORPORATION, a Delaware corporation, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSON, D. W. REEVES, R. C. SCHENK and N. F. TISDALE, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

CHARLES S. RHYNE
COURTS OULAHAN
ALEXANDER YOUNGER
RHYNE & RHYNE
400 Hill Building
Washington, D. C. 20006
Attorneys for Respondents

INDEX

	PAGE
Statement of the Case	1
Questions Presented	4
ARGUMENT:	
I. The Decision of this Court in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, Clearly Does Not Apply To The Factual Situation Here	5
II. There Is No Conflict Between the Holding Below and the Law Prevailing in the Second Circuit on the Class Action Question	8
III. There Is No Occasion For This Court To Review The Procedure Followed By The District Court In Dismissing Petitioner's Complaint	12
CONCLUSION	16

CITATIONS

Cases:	PAGE
Anderson National Bank v. *Luckett*, 321 U.S. 233	14
Carroll v. *American Federation of Musicians*, 372 F. 2d 155 (2d Cir. 1967), vacated, 391 U.S. 99	11
Conley v. *Gibson*, 355 U.S. 41	12, 14
Crawford v. *Texaco, Inc.* 40 F.R.D. 381 (S.D.N.Y. 1966)	11
Dasho et al. v. *Susquehanna Corp.*, CCH Fed. Sec. L. Rep. ¶ 92,575 (N.D. Ill. 1970)	2
Edelman v. *California*, 344 U.S. 357	7
Eisen v. *Carlisle & Jacqueline*, 391 F. 2d 555 (2d Cir. 1968)	8, 9, 10, 11
Foman v. *Davis*, 371 U.S. 178	14

PAGE

Georgia Southern & Florida Railway Co. v. *Atlantic Coast Line Railway Co.*, 373 F. 2d 493 (5th Cir. 1967) 15

Giordano v. *Radio Corporation of America*, 183 F. 2d 558 (3rd Cir. 1950) 11

Hannah v. *Larche*, 363 U.S. 420 14

Hansberry v. *Lee*, 311 U.S. 32 11

Hess v. *Anderson, Clayton & Co.*, 20 F.R.D. 466 (S.D. Calif. 1957) 11

Hohmann v. *Packard Instrument Co.*, 399 F. 2d 711 (7th Cir. 1968) 8, 9, 10, 11

J. I. Case Co. v. *Borak*, 377 U.S. 426 ..... 4, 8

Mills v. *Electric Auto-Lite Co.*, 403 F. 2d 429 (7th Cir. 1968), reversed, 396 U.S. 375 ..... 4, 5, 6, 7, 8

Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 14

Neely v. *Martin K. Eby Const. Co.*, 386 U.S. 317 ... 7

Pelelas v. *Caterpillar Tractor Co.*, 113 F. 2d 629 (7th Cir. 1940) 11

Schroeder v. *City of New York*, 371 U.S. 208 14

Schy v. *Susquehanna Corp.*, 419 F. 2d 1112 (7th Cir. 1970) 3, 4, 6, 7, 9, 11, 15, 16

Surowitz v. *Hilton Hotel Corp.*, 383 U.S. 363 .... 13, 14

Troup v. *McCart*, 238 F. 2d 289 (5th Cir. 1956) ... 11

White River Lumber Co. v. *Arkansas*, 279 U.S. 692 7

Wisconsin v. *Federal Power Commission*, 373 U.S. 294 7

Statute:

Securities Exchange Act of 1934 (15 U.S.C. § 78a) 1

Miscellaneous:

Federal Rules of Civil Procedure:

Rule 12(b)(6) 15, 16

Rule 23 12

IN THE

Supreme Court of the United States

October Term, 1970

No. 320

MAURICE H. SCHY,

Petitioner,

v.

THE SUSQUEHANNA CORPORATION, a Delaware corporation, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSON, D. W. REEVES, R. C. SCHENK and N. F. TISDALE, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Statement of the Case

Petitioner is an attorney and stockholder in The Susquehanna Corporation (Susquehanna) who seeks to have this Court review every facet of the decisions of the two Courts below dismissing his purported class action under Section 14(a) of the Securities Exchange Act of 1934 (the "Act"). Both the District Court and the Court of Appeals held (1) that Petitioner did not adequately represent the class—Susquehanna stockholders—on whose behalf he allegedly

sued, and (2) that the action should be dismissed for failure to state a claim on which relief could be granted.

Petitioner brought suit in the United States District Court for the Northern District of Illinois on October 18, 1967, on behalf of himself and other stockholders "situated similarly" to enjoin the issuance of a newly-authorized class of Preferred Stock of Susquehanna.[1] Issuance of this Preferred Stock had been previously authorized by the stockholders after their votes had been solicited by a Proxy Statement for the Corporation's Annual Meeting dated March 29, 1967. Petitioner's Complaint alleged that this Proxy Statement omitted material information in violation of Section 14(a).

However, on October 26, 1967, eight days after Petitioner filed his action, Susquehanna, together with Atlantic Research Corporation, issued a Joint Proxy Statement (Merger Proxy Statement). This second Merger Proxy Statement sought stockholder approval for the proposed merger of the two corporations. It also sought stockholder approval for the *issuance* of the Preferred Stock authorized by the March 29 Statement. Because this Preferred Stock was basic to the merger plan, the Merger Proxy Statement described the terms of its issuance in exhaustive detail. In addition, the Merger Proxy Statement covered the same ground as the March 29 Proxy Statement by seeking, once again, stockholder approval of an amendment to the Certificate of Incorporation authorizing issuance of the Preferred Stock. The exact text of the Amendment was included.

---

[1] Other complaints of Petitioner against this same corporation were held to be without merit after a lengthy trial in *Dasho, Dasho-Rogers, Inc. and Maurice H. Schy* v. *The Susquehanna Corporation et al.*, CCH Fed. Sec. L. Rep. ¶ 92,575 (N.D. Ill. 1970).

The Merger Proxy Statement also contained a complete summary of every aspect of Petitioner's Complaint, including the relief sought—an injunction against issuance of the Preferred Stock. At oral argument before the Court of Appeals, Petitioner's counsel admitted that this summary, as well as the rest of the Merger Proxy Statement, was complete and fair.

The stockholders, acting on the basis of the Merger Proxy Statement, voted almost unanimously—80.8% to 0.42%—to approve the Atlantic Research-Susquehanna merger. They also approved authorization and issuance of the Preferred Stock—doing so fully mindful of Petitioner's pending Complaint.

Thereafter, Respondents, relying on this stockholder repudiation of Petitioner's claims, moved for an order (1) that Petitioner could not adequately represent the class, and (2) that the Complaint should be dismissed because Petitioner had not exhausted his intracorporate remedies.

The District Court, after receiving memoranda and exhibits from both sides and hearing oral argument, held that the action could not be maintained as a class action, and that the Complaint failed to state a claim. It reached the latter conclusion after determining that the action was moot, that no damage resulted to Susquehanna's stockholders from the challenged actions, and that the Merger Proxy Statement gave full notice to the stockholders about Petitioner's Complaint.

The Court of Appeals unanimously affirmed. It agreed with the District Court's holding that Petitioner could not properly represent other stockholders, and held that summary judgment was properly granted. 419 F. 2d at 1116-17. On the merits, the Court of Appeals held that the District Court

correctly found that the March 29 Proxy Statement—the basis of Petitioner's claim—was not the cause of any corporate action, and no damage resulted from its issuance. "The shares which were issued and used to effectuate the merger were issued in response to the October 26, 1967 proxy, which the plaintiff admits was fair and complete." 419 F.2d at 1117. Any defect in the earlier proxy statement was held cured by the later Merger Proxy Statement: "Here there was no influence from the March 29, 1967 proxy statement which was unremedied by the October 26, 1967 proxy statement." 419 F.2d at 1117.

The Court further held that this Court's opinion in *J. I. Case Co.* v. *Borak*, 377 U.S. 426 and its own opinion in *Mills* v. *Electric Auto-Lite Co.*, 403 F. 2d 429 (7th Cir. 1968), reversed 396 U.S. 375, were inapplicable because the facts of those cases are so very different.

Questions Presented

I. Whether this Court should, on the basis of its opinion in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, review the decision below, where the Proxy Statement which is alleged to be false and misleading was superseded by a subsequent Proxy Statement which was admittedly fair and accurate, the corporate action complained of being based on this subsequent Proxy Statement?

II. Whether this Court should review the decision below disqualifying Petitioner as a class representative where there is no underlying factual basis on which a substantive cause of action can be grounded?

III. Whether this Court should review the decision below disqualifying Petitioner as a class representative because his position was found to have been overwhelmingly repudiated by the class he purported to represent, and because his interests were found to conflict with those of the class?

IV. Whether this Court should grant certiorari to review the holding of the Court of Appeals that summary judgment was properly granted, where the decision on the merits is clearly correct and Petitioner's contentions as to the procedure followed below raise no genuine issues of any magnitude?

ARGUMENT

The decisions below are clearly correct, both on the merits and on the procedural questions involved. There is no conflict of decisions. The questions involved are not of general or prospective importance. Indeed, both holdings below turn on the unique factual pattern presented by this record. Accordingly, there is no occasion for further review.

I. The Decision of this Court in *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, Clearly Does Not Apply To The Factual Situation Here.

Petitioner's effort to attract the Court's interest in this case by concocting an alleged disregard of *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375, by the Court of Appeals is baseless. *Mills* is inapplicable here because there is a break in the chain of causation which divorces the Proxy Statement which Petitioner's lawsuit challenges from the corporate action taken by the stockholders.

The fatal flaw in Petitioner's effort to apply *Mills* here is that it fails to take account of the fact that *two* Proxy Statements are involved. Petitioner's contention that the first one—the March 29 Proxy Statement—was "deceptive in material respects" and hence violative of Section 14(a) overlooks the fact that, as the Court of Appeals said, "The shares which were issued and used to effectuate the merger were issued in response to the October 26, 1967 [Merger] Proxy [Statement], which the plaintiff admits was fair and complete." 419 F. 2d at 1117.

Nothing was done as a result of the March 29 Proxy Statement. All that Management sought therein was stockholder approval of an amendment to the Certificate of Incorporation authorizing future issuance of the Preferred Stock. But, as the Court of Appeals noted, "No shares of preferred stock were ever issued pursuant to the March 29, 1967 proxy." 419 F. 2d at 1117.

When the Preferred Stock was issued, it was done pursuant to stockholder approval sought in the Merger Proxy Statement. Retreading ground already trod in March, this Statement sought new stockholder authorization by seeking approval of an amendment virtually identical to the one proposed in the March 29 Statement. The terms surrounding the actual issuance of the Preferred Stock—dividend, voting, liquidation and conversion rights and redemption privileges—were detailed in the new Merger Proxy Statement. This Merger Proxy Statement, which Petitioner admitted on oral argument in the Court of Appeals "was

accurate and complete",[2] 419 F. 2d at 1114, was the legal cause of the corporate action about which Petitioner complains—issuance of the Preferred Stock.

In *Mills*, this Court addressed itself to a situation wholly different from the one here. That case furnishes no basis for the grant of certiorari. In *Mills*, the proxy statement under attack was the one employed to induce stockholder approval of the merger. Petitioner's attack here is on the March 29 Proxy Statement, superseded in every respect by one which two Courts, as well as Petitioner's counsel, have said was fair and accurate. The March 29 Proxy Statement was not "an essential link in the accomplishment of the transaction", 396 U.S. 385. Indeed, it was entirely academic. Surely the instant case is a prime example of what this Court contemplated when it said that its postulation of the materiality requirement

> "adequately serves the purpose of insuring that a cause of action cannot be established by proof of a defect so trivial, *or so unrelated to the transaction for which approval is sought*, that correction of the

---

[2] Petitioner's assertion that the Court of Appeals "based" its affirmance of the District Court on his counsel's admission in oral argument that the Merger Proxy Statement was fair is clearly spurious. This fabricated issue affords no basis for granting certiorari. Petitioner's counsel did make the admission. Petitioner is bound by the statements of his freely chosen agent, and the Merger Proxy Statement is, as both Courts below held, complete, fair and accurate. Moreover, even if his counsel did not make the admission, Petitioner never challenged the Merger Proxy Statement in his Complaint or his Amended Complaint, and he cannot smuggle in a new cause of action at this stage of the proceedings, or raise questions here which he did not raise below. *Neely* v. *Martin K. Eby Const. Co.*, 386 U.S. 317, 330; *Wisconsin* v. *Federal Power Commission*, 373 U.S. 294, 303. See also *White River Lumber Co.* v. *Arkansas*, 279 U.S. 692, 700; *Edelman* v. *California*, 344 U.S. 357.

> defect or imposition of liability would not further the interests protected by § 14(a)." 396 U.S. at 384. (Emphasis added).

Here the alleged defects were so academic, so unrelated to the assailed action, that imposition of liability would do violence to Section 14(a). Lack of any possible causal connection was *prima facie* evident from the moving papers. There was no dispute below concerning the operative facts. Therefore, mindful that this case is manifestly distinguishable from *Mills*, both Courts below correctly held that Petitioner could not possibly establish a cause of action. *Mills* thus provides no ground for granting the writ.

Just as Petitioner's reliance on *Mills* is misplaced, so also is his reliance on *J. I. Case Co.* v. *Borak*, 377 U.S. 426, 431. There the Court simply held that the causation question should be resolved at trial; not in this Court. The Proxy Statement involved there, however, clearly played *some* part in the merger. Whether it had decisive effect was the issue over which there was a factual dispute. Here, however, the record is clear that the March 29 Proxy Statement was not responsible for the challenged corporate action.

II. There Is No Conflict Between the Holding Below and the Law Prevailing in the Second Circuit on the Class Action Question.

Contrary to Petitioner's assertion, there is no conflict of decisions on the class action issue. Petitioner has sought to manufacture a conflict between the Court of Appeals holding here, on the one hand, and decisions of the Second and Seventh Circuits in *Eisen* v. *Carlisle & Jacqueline*, 391 F. 2d 555 (2d Cir. 1968) and *Hohmann* v. *Packard Instrument Co.*, 399 F. 2d 711 (7th Cir. 1968), on the other hand.

Even if Petitioner's contention were sound, it would furnish no occasion for granting the writ. This is so because the two Courts below were so clearly correct in their holdings on the merits that for this Court to grant certiorari because of this alleged issue would afford only an opportunity to correct a technical error. On the merits, Petitioner's cause of action has been held to be moot. There is no possible way Petitioner can show any causal nexus between the alleged deficiencies in the March 29 Proxy Statement and the issuance of the Preferred Stock. The subsequent Merger Proxy Statement is admittedly fair. Therefore, it would be nothing short of futile for this Court to grant certiorari to correct an asserted error of adjective law where the underlying substantive claim is without legal basis.

Denial of the writ may be justified on the alternative ground, however, that the Court of Appeals decision is consistent with *Eisen* and *Hohmann*. Petitioner urged both these cases on the Court of Appeals. That Court rejected them as controlling authority because both cases merely hold that, on the issue of adequate representation, the fact that only one or two of a large class have filed suit and no others have intervened is not dispositive. Neither case dealt with the situation here, where a large majority of the class, on being fully informed of Petitioner's claims as their representative (as they were in the Merger Proxy Statement), repudiated him as their representative by voting almost unanimously[3] to authorize and issue the Preferred Stock (to which his Complaint objected) and to use it in the merger.

---

[3] As the Court of Appeals stated: "After being fully informed of the nature of plaintiff's pending suit, 80.8% of the stockholders voted in favor of the proposal made in the October 26, 1967 proxy statement. . . . Only 0.42% voted against it." 419 F. 2d at 1117.

In *Eisen*, the Court of Appeals reversed the District Court's holding that the Plaintiff there was not a proper representative because he was the only member of a large class who had sued and because no other members had sought to intervene. The essence of the Court's holding is in the following passage:

> "We are not persuaded that it is essential that any other members of the class seek to intervene. . . . If we have to rely on one litigant to assert the rights of a large class then rely we must. . . .
>
> "Necessarily, a different situation is presented where absent class members inform the court of their displeasure with plaintiff's representation, [citation], but the representative party cannot be said to have an affirmative duty to demonstrate that the whole or a majority of the class considers his representation adequate." 391 F.2d at 563.

Thus *Eisen* simply held that a class action could not be dismissed solely because other members of the class were silent and had not sought to intervene. But here the Court of Appeals laid stress on the fact that the stockholders massively repudiated Petitioner's gratuitous efforts by their informed vote to authorize and carry out the very action his lawsuit sought to block.

Hohmann, which like the instant case was decided by the Seventh Circuit, followed *Eisen* and cited it with approval. In *Hohmann*, the Court's holding was also limited to the narrow point that "whether other members of the class have sought to intervene is not determinative of the question whether the plaintiffs are qualified to act in behalf of absent members of the class." 399 F. 2d at 714.

Both *Eisen* and *Hohmann*, therefore, dealt with the narrow question of what inferences a Court could properly draw from silence and inaction by other members of a class. In *Schy*, the Court dealt with the inference to be drawn from the affirmative action taken by members of the class to repudiate the essence of the cause of action. The cases are thus plainly distinguishable. The decision of the Court below is also squarely in accord with decisions of other Courts of Appeals on the same issue.[4] There is therefore no conflict between the Circuits warranting issuance of a writ.

Rather than "leaving conflict in its wake" as Petitioner asserts, the Court below was faithful to decisions of this Court in purported class action cases. The Court of Appeals properly relied on this Court's holding in *Hansberry v. Lee*, 311 U.S. 32, 44-45 and *Carroll v. American Federation of Musicians*, 391 U.S. 99, 103, Note 4, which also involved situations where substantial portions of a class took positions contrary to that of their self-appointed representative. There is thus no occasion for further review.

Certiorari should also be denied on the additional ground that the representation question presented here arises from the unique facts of this case. Petitioner is an attorney. His counsel below filed an Affidavit with the District Court stating that there was an agreement that Petitioner would share in whatever attorney's fees might be allowed. Both Courts below indicated that, because of this fact and because of

---

[4] *Troup* v. *McCart*, 238 F. 2d 289, 294 (5th Cir. 1956); *Giordano* v. *Radio Corporation of America*, 183 F. 2d 558, 560 (3rd Cir. 1950); *Pelelas* v. *Caterpillar Tractor Co.*, 113 F. 2d 629, 632 (7th Cir. 1940); *Carroll* v. *American Federation of Musicians*, 372 F. 2d 155, 162 (2d Cir. 1967), vacated on other grounds, 391 U.S. 99; see also *Crawford* v. *Texaco, Inc.*, 40 F.R.D. 381, 385 (S.D.N.Y. 1966); *Hess* v. *Anderson, Clayton & Co.*, 20 F.R.D. 466, 483 (S.D. Calif. 1957).

the stockholders' repudiation of Petitioner's position, his interests conflicted with those of the class. The lack of direct authority on the issue—the Petition for Certiorari cites none—indicates that the question can hardly be said to be of widespread and recurring importance to the Federal Courts. Should the question arise in the future, its resolution by the two Courts below provides ample guidelines for decision consistent with the language and purposes of Rule 23, F.R.C.P. Determination of this aspect of the case below thus eliminates any need for further consideration by this Court.

III. There Is No Occasion For This Court To Review The Procedure Followed By The District Court In Dismissing Petitioner's Complaint.

The lack of merit in Petitioner's position is nowhere more clearly demonstrated than in his lengthy argument that he was denied due process of law by the trial Court's granting of summary judgment in this case. Petitioner's argument, essentially an effort to have this Court second guess every action of the District Court, is not supported by authority and raises issues which have already been considered by another appellate tribunal. None of Petitioner's numerous contentions is of sufficient magnitude to justify review here.

Prior decisions of this Court cited by Petitioner are plainly distinguishable. Thus, the language from *Conley* v. *Gibson*, 355 U.S. 41, 48 (Petition, p. 16) concerned an argument by respondents there that the Complaint therein, filed by Negro employees contending their union was not representing them fairly, "failed to set forth specific facts to support its general allegations of discrimination and that

its dismissal is therefore proper." 355 U.S. at 47. Respondents here, however, did not seek dismissal because of defective pleading, but because Petitioner was disqualified as a class representative who had no legally cognizable claim.

Similarly, Petitioner wholly misconstrues this Court's decision in *Surowitz* v. *Hilton Hotel Corp.*, 383 U.S. 363, 373. Petitioner, himself an attorney, was represented in both courts below by a nine-member law firm, yet he seeks by inference to put himself in the same category as the "unsophisticated litigant" so summarily dealt with by the trial Court in *Surowitz*. There it was apparent that, as the Court of Appeals had noted, "many of the material allegations of the complaint are true and cannot be refuted", 342 F. 2d at 607, yet the District Court dismissed without requiring any response from Defendants. In language ignored by Petitioner, this Court held:

> "We cannot construe Rule 23 or any other one of the Federal Rules as compelling courts to summarily dismiss, *without any answer or argument at all*, cases like this whose grave charges of fraud are shown on the record to be based on reasonable beliefs, growing out of careful investigation." 383 U.S. at 373. (Emphasis added).

Here, an Answer was filed. A hearing was held. Respondents' Motion, together with Exhibits, was filed on July 17, 1968, and oral argument on the Motion was held some three months later, on October 15, 1968—adequate time for Petitioner and his counsel to prepare. Here too, unlike *Surowitz*, Petitioner previously had filed a Motion for Summary Judgment, which he subsequently withdrew but

later renewed. And, unlike *Surowitz*, the Complaint here can hardly be said to be "based on reasonable beliefs growing out of careful investigation."

Petitioner's citation of *Foman* v. *Davis*, 371 U.S. 178, to support his contention that the District Court wrongly denied him leave to amend, is also wide of the mark. *Foman* involved a situation worlds apart from that here, and held that a District Court should have granted leave where the proposed amended complaint would have done no more than state an alternative theory. 371 U.S. at 182. But here the proposed new pleading was identical in all material respects with the original pleading except that it included a claim for money damages. Leave to amend would thus have been futile.

Conley, *Surowitz* and *Foman*, like the other decisions[5] relied on by Petitioner, are thus factually distinguishable and furnish no authority for granting certiorari.

Apart from the fact the Petitioner has not cited any authority in point, the Court should deny certiorari for the additional reason that the arguments raised by Petitioner about the District Court's dismissal have been fully considered by the Court of Appeals and found to be either inaccurate or without merit. Thus, Petitioner intimates that his counsel was taken by surprise by Respondent's

---

[5] *Anderson National Bank* v. *Luckett*, 321 U.S. 233, *Schroeder* v. *City of New York*, 371 U.S. 208, and *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, cited in the Petition (p. 18), all involved the question whether statutory notice provisions comport with due process requirements. Petitioner, however, does not challenge the notice provisions of the Federal Rules of Civil Procedure. Petitioner's reliance on *Hannah* v. *Larche*, 363 U.S. 420, 442 (Petition, p. 18) is mystifying, since that case concerns the due process rights to be accorded by investigative agencies, an issue wholly irrelevant here.

moving to dismiss for failure to state a claim. Respondents' Motion to Dismiss had been grounded on Petitioner's failure to exhaust his intracorporate remedies. But, when Respondents raised the Rule 12(b)(6)[6] defense at the oral argument on the motion, Petitioner's counsel, rather than objecting or indicating he was unprepared, argued strenuously and at length that Respondents were wrong in asserting that there was no damage to the corporation. Petitioner cannot now contend that he was taken by surprise. As the Court of Appeals held, ". . . the plaintiff fully argued this ground at the hearing and cannot complain here that the district court considered it. [citing cases]." 419 F. 2d at 1115. Moreover, the defense of failure to state a claim had been raised in the Answer and the Answer was before the Court.

Similarly, Petitioner's objection to Exhibits accompanying Respondents' motion to dismiss comes late in the day. As the Court of Appeals held, "The plaintiff did not complain of untimeliness in the trial court, although he did urge the court not to consider the exhibits as evidence. Since the plaintiff did not complain about the late filing in the trial court, he cannot do so on appeal." 419 F.2d at 1116. *Georgia Southern and Florida Railway Co.* v. *Atlantic Coast Line Railway Co.*, 373 F. 2d 493 (5th Cir. 1967) does not support petitioner's position. There, the losing party had no notice before a hearing on a motion for preliminary injunction that "a final judgment would result from it." 373 F. 2d at 497. Here, Petitioner had known for three

[6] This Rule provides:

"Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto, except that the following defenses at the option of the pleader may be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . ."

months that Respondents would seek dismissal of his Complaint. Petitioner came to the hearing prepared to argue against the dismissal. Petitioner also knew from Respondents' Answer that they relied on the Rule 12(b)(6) defense.

In challenging as he does the conclusion of the Court of Appeals that "the procedure followed by the district court in granting summary judgment did not involve reversible error." 419 F. 2d at 1116, Petitioner appears to be asking this Court to assume the role of a trial Court and hear once again his objections to Respondents' Motion to Dismiss. That is not this Court's function. Hence it should deny certiorari on this as well as on the other grounds stated in this Brief.

CONCLUSION

The Petition for Certiorari raises no issue of sufficient magnitude to justify consideration by this Court, points to no conflict of decisions, and shows no error by the Courts below. It is therefore respectfully urged that the Petition should be denied.

CHARLES S. RHYNE
COURTS OULAHAN
ALEXANDER YOUNGER
RHYNE & RHYNE
400 Hill Building
Washington, D. C. 20006
Attorneys for Respondents

July 24, 1970.

SUPREME COURT, U. S.

Supreme Court, U.S.

AUG 17 1970

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

No. 320

MAURICE H. SCHY,

Petitioner,

vs.

THE SUSQUEHANNA CORPORATION, A DELAWARE CORPORATION, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSEN, D. W. REEVES, R. C. SCHENK AND N. F. TISDALE, JR.,

Respondents.

BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION.

MAURICE H. SCHY,
9225 Collins Avenue,
Surfside, Florida 33154,
Petitioner pro se.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 320

MAURICE H. SCHY,

Petitioner,

vs.

THE SUSQUEHANNA CORPORATION, A DELAWARE CORPORATION, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSEN, D. W. REEVES, R. C. SCHENK AND N. F. TISDALE, JR.,

Respondents.

BRIEF IN REPLY TO RESPONDENTS' BRIEF IN OPPOSITION.

THE PETITION PRESENTS THE SIGNIFICANT QUESTION OF WHETHER THE SYSTEM AFFORDS EVEN-HANDED JUSTICE TO THE SMALL STOCKHOLDER WHO ATTACKS THE ESTABLISHMENT IN COURT.

Respondents' gratuitous reference to *Dasho v. Susquehanna* (Resp. br., footnote, p. 2) clearly infers that petitioner has harassed respondents with spurious suits. *Dasho* is on appeal to the Seventh Circuit. Therefore petitioner will limit his reference to a single order and finding in that case which will suffice to rebut respondents' unwarranted inference:

Through discovery in *Dasho*, plaintiffs came into possession of documents that outlined the specific terms of an agreement between the defendants, a bank and two insurance companies to document a loan-arrangement in such manner as to permit defendants to issue a false and misleading proxy statement, precisely as alleged in the complaint, by "adjusting" the balance sheet in a manner that would avoid questions that the S. E. C. would otherwise ask. On defendants' motion, the court enjoined plaintiffs and their counsel from communicating in any way the "existence or contents" of those documents and they were excluded as evidence in the case.

Further, the record in *Dasho* establishes that one of the defendants, who is also a defendant in *Schy*, was convicted and imprisoned for unlawfully giving money to a union representative; that a corporation of which he was president was twice convicted and fined for criminal violations of federal statutes; that a federal court found that he had "* * * willfully and deliberately engaged in infringement practices with the intent to deceive and defraud"; and that the S. E. C. in December, 1968, filed a complaint alleging that he had made false and misleading statements in connection with a public tender-offer. In dismissing *Dasho*, the court found that "All of the individual defendants are reputable businessmen, the integrity and veracity of whom was not *questioned* on this record." (Emphasis added.)

Confidence in the courts has been a matter of concern to the Chief Justice, who said recently,* "A sense of confidence in the courts is essential to maintain the fabric of ordered liberty for a free people. Three things could destroy that confidence and do incalculable damage to society . . . One is that people who have long been exploited come to believe that courts cannot vindicate their

* Address to the American Bar Association, August 10, 1970.

legal rights from fraud and over-reaching in the smaller transactions of daily life."

Confidence is not fostered in courts where the truth is buried and where the integrity and veracity of the tycoon and the tyro are measured by radically different standards. Although the immediate reference of the Chief Justice's remarks is to the blacks and the poor, it is no less true in broader application. The small stockholder has long been exploited and, confronted with the chilling necessity of pitting his puny purse against the vast corporate treasure of the Establishment, he can only conclude that he cannot vindicate his legal rights within the framework of our judicial system.

This action, aborted in its early stages, has been an experience in frustration for petitioner, who, like Franz K. before him, now knows the struggle to find the Court.

Respectfully submitted,

MAURICE H. SCHY,
9225 Collins Avenue,
Surfside, Florida 33154,
Petitioner pro se.

SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
OCT 5 1970
E. ROBERT SEAVER, CLE

In the Supreme Court of the United States

October Term, 1970

No. 320

MAURICE H. SCHY,

Petitioner,

vs.

THE SUSQUEHANNA CORPORATION, a Delaware corporation, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSEN, D. W. REEVES, R. C. SCHENK and N. F. TISDALE, JR.,

Respondents.

SUPPLEMENTARY BRIEF OF PETITIONER

MAURICE H. SCHY
9225 Collins Avenue
Surfside, Florida 33154,
Petitioner pro se.

MIAMI REVIEW — 371-4853 — 377-3721

in the Supreme Court of the United States

October Term, 1970

No. 320

MAURICE H. SCHY,

Petitioner,

vs.

THE SUSQUEHANNA CORPORATION, a Delaware corporation; SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSEN, D. W. REEVES, R. C. SCHENK and N. F. TISDALE, JR.,

Respondents.

SUPPLEMENTARY BRIEF OF PETITIONER

Petitioner seeks, pursuant to Rule 24-5, to call the attention of the Court to a matter not available on June 26, 1970, when the petition was filed and which petitioner submits relates to the importance of the questions presented by the petition.

On July 20, 1970, the S. E. C. sustained the finding of its examiner, made on August 5, 1969, that Susquehanna had made false and misleading statements in connection with a public tender-offer made on November 26, 1968, to purchase 1,800,000 shares (38%) of the common stock of Pan American Sulphur Company ("Pasco") at $40.00 per share, in having denied its plan to use Pasco's assets, which included $58,000,000. in cash or equivalents, to acquire control of American Smelting and Refining Company ("Asarco"), or to make other major changes in Pasco's corporate structure. The S. E. C. order required Susquehanna to amend certain documents filed by it in 1968.

Susquehanna had financed the illicit tender-offer by making unsecured loans of $71,000,000. from banks (including one of $20,000,000. from the First National Bank of Boston), and an investment company. The notes called for repayment of $15,000,000. within six months and of $56,000,000. within fourteen months. Within six months the market-value of the Pasco shares acquired by the tender-offer had depreciated approximately $10,000,000. and within fourteen months had depreciated approximately $40,000,000. In view of Susquehanna's comparatively miniscule net earnings, such depreciated values have had a profound effect on the fiscal condition of the company.

Undeterred by the S.E.C. proceeding and the adverse decision of its examiner, Susquehanna overcame the strenuous resistance of Pasco and accomplished the take-over of its assets, which are now available to service the wildly speculative loans that made the illicit tender-offer possible.

The petition presents the question *inter alia* of whether, in disqualifying an attorney-stockholder as a class representative, the courts below advance or frustrate the purpose of the securities laws. In weighing the importance of that and other questions presented by the petition the Court should consider several ramifications of the Pasco episode. One is the shocking inadequacy of present facilities for stockholder protection. The sanction imposed by the S.E.C.—that Susquehanna amend the false and misleading documents filed in 1968—is totally ineffective for that purpose. To an aggressive and pragmatic management it is innocuous enough to make violation seem a good risk. In one sense, Susquehanna may have been ill-used. Doting courts, like doting parents, often deprive their charges of the benefits of deserved discipline. Susquehanna might have learned the error of its ways and might never have published its illicit tender-offer had not the court in *Dasho*, a case to which respondents' brief calls the Court's attention, determined that protection of stockholders' interests called for an order forbidding plaintiff from disclosing to enforcement officials the "existence or content" of documents prepared by the Massachusetts Mutual Life Insurance Company and describing in detail the plan of Susquehanna and the First National Bank of Boston to "adjust" Susquehanna's balance sheet for the express purpose of misleading the stockholders and the S.E.C.

The petition should be considered with a view to what its disposition will mean not only to the 9,000 Susquehanna stockholders whose rights were forever terminated without notice by the courts below but to all stock-

holders whose interests need and ought to be protected. The Court should not countenance *Schy* as a precursor to future Pascos.

Petitioner attributes no Promethean proportion to his petition. It does, however represent his conviction that trammeled rights and admitted wrongs, however shrewdly reasoned, ought not to pass for justice within our system. Opposed by wealth and power, such convictions are not asserted in comfort. They are sustained through personal sacrific and not from the corporate coffer. This petition does not come lightly to the Court; it ought not lightly be denied.

Respectfully submitted

MAURICE H. SCHY
Petitioner pro se.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Supplementary Brief has been furnished by mail to the following Counsel of Record this day of October, 1970.

MAURICE H. SCHY
9225 Collins Avenue
Surfside, Florida 33154

RHYNE & RHYNE
400 Hill Building
Washington, D. C. 20006

MELVAN M. JACOBS
ROBERT MANSELL
135 S. LaSalle Street
Chicago, Illinois 60603

LIBRARY
SUPREME COURT, U. S.

FILED
OCT 8 1970
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 320

MAURICE H. SCHY,

Petitioner,

—v.—

THE SUSQUEHANNA CORPORATION, a Delaware corporation, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSEN, D. W. REEVES, R. C. SCHENK and N. F. TISDALE, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO SUPPLEMENTARY BRIEF OF PETITIONER

CHARLES S. RHYNE
COURTS OULAHAN
RHYNE & RHYNE
400 Hill Building
Washington, D. C. 20006

Attorneys for Respondents

IN THE

Supreme Court of the United States

October Term, 1970

No. 320

MAURICE H. SCHY,

Petitioner.

—v.—

THE SUSQUEHANNA CORPORATION, a Delaware corporation, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSEN, D. W. REEVES, R. C. SCHENK and N. F. TISDALE, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY TO SUPPLEMENTARY BRIEF OF PETITIONER

Despite the irrelevant and erroneous presentation in Petitioner's "Brief in Reply to Respondents' Brief in Opposition", filed June 26, 1970, Respondents chose not to reply to such a deviation from the practice before this Court.

However, under date of on or about October 1, 1970, received October 6, 1970 by Respondents' counsel, Petitioner has filed with this Court a purported "Supplementary Brief of Petitioner", pursuant to Rule 24(5). The brief refers

to a decision of the Securities and Exchange Commission (SEC) rendered two and one-half months ago.

The brief does not refer to a decision of the Fifth Circuit Court of Appeals which specifically found that there was no violation of the Federal Securities laws by Susquehanna with respect to the tender offer which is described in the brief and the SEC decision. *The Susquehanna Corporation et al. v. Pan American Sulphur Co. et al.*, 423 F. 2d 1075 (March 13, 1970). In that case, a motion for a stay of mandate pending the filing of a petition for a writ of certiorari was denied by Mr. Justice Black on April 24, 1970, and the mandate of the Fifth Circuit Court of Appeals issued April 28, 1970. Both the Fifth Circuit and SEC decisions are irrelevant to any issue before this Court.

Charles S. Rhyne
Courts Oulahan
Rhyne & Rhyne
400 Hill Building
Washington, D. C. 20006
Attorneys for Respondents

October 6, 1970.

IN THE

Supreme Court of the United States

October Term, 1970

No. 320

MAURICE H. SCHY,

Petitioner,

—v.—

THE SUSQUEHANNA CORPORATION, a Delaware corporation, SAMUEL M. FERGUSON, M. M. HARDIN, H. F. KORHOLZ, J. EARLE MAY, HUGH C. MICHELS, AKSEL NIELSEN, D. W. REEVES, R. C. SCHENK and N. F. TISDALE, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

CERTIFICATE OF SERVICE

I, CHARLES S. RHYNE, a member of the Bar of this Court, hereby certify that on this 6th day of October, 1970, three copies of the Reply to Supplementary Brief of Petitioner were airmailed, postage prepaid, to Maurice H. Schy, Esq., 9225 Collins Avenue, Surfside, Florida 33154, Petitioner *pro se.*

CHARLES S. RHYNE
RHYNE & RHYNE
400 Hill Building
Washington, D. C. 20006

Counsel for Respondents